TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 518.

MILLER & LUX, INCORPORATED, APPELLANT,

vs.

EAST SIDE CANAL & IRRIGATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED AUGUST 22, 1906.

(21,314.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 26, 1908.

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a In the Circuit Court of the United States in and for the Southern District of California, Northern Division, Ninth Circuit.

No. 92.

MILLER & LUX, INCORPORATED, Complainant,
vs.
EAST SIDE CANAL AND IRRIGATION COMPANY, Defendant.

Citation on Appeal.

To the Defendant in the above entitled action and Mr. James F. Peck, solicitor for defendant:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be held in the City of Washington, District of Columbia, on the 20th day of July, 1908, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the Circuit Court of the United States, Southern District of California, Northern Division, Ninth Circuit, from the Final Decree signed, filed and entered on the 4th day of May, 1908, in that certain suit being in equity 92, wherein Miller & Lux Incorporated (a Corporation) is complainant and appellant, and you are Defendant and Appellee, to show cause, if any there be, why the Decree rendered against Appellant as in said order allowing appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

b Witness, the Honorable Olin Wellborn, United States District Judge holding the Circuit Court of the United States, in and for the Southern District of California, Northern Division.

OLIN WELLBORN,
District Judge, Holding the Circuit Court of the United States, Southern District of California, Northern Division.

Received a copy of the within Citation this 2nd day of June, 1908.

JAMES F. PECK,
Solicitor for Defendant.

c [Endorsed:] No. 92. In the Circuit Court in and for the Southern District of California, Northern Division, Ninth Circuit. Miller & Lux Incorporated, Complainant, *vs.* East Side Canal and Irrigation Company, Defendant. Citation on Appeal. Filed Jun- 8 1908. Wm. M. Van Dyke, Clerk, —— ——, Deputy. Edward F. Treadwell Attorney-at-Law 1314 Merchants Exchange Building San Francisco, California.

1 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California, Northern Division.

No. 92.

MILLER & LUX, INCORPORATED, Complainant,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY, Defendant.

2 In the Circuit Court of the United States for the Southern District of California, Northern Division.

In Equity.

MILLER & LUX, INCORPORATED, a Corporation, Complainant,
vs.
THE EAST SIDE CANAL AND IRRIGATION COMPANY, a Corporation, Defendant.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Southern District of California, Northern Division:

Miller & Lux, Incorporated, a corporation formed, organized, and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, State of Nevada, and a citizen of the State of Nevada, brings this its bill against The East Side Canal and Irrigation Company, a corporation organized and existing under the laws of the State of California, and a citizen of the State of California; and thereupon your orator complains and says:

1. That said complainant is a corporation formed, organized, and existing under the laws of the State of Nevada, and has its principal place of business at Carson City in the State of Nevada; and is a citizen of the State of Nevada.

3 2. That the defendant The East Side Canal and Irrigation Company is a corporation formed, organized and existing under the laws of the State of California, and has its principal place of business in the County of Merced, in the State of California, in the Southern District of California, and within the Northern Division thereof, and is a citizen of the State of California.

3. That complainant herein, Miller & Lux, Incorporated, is, and its grantors for more than twenty-five years last past, have been the owners in fee and seized and possessed of all those certain tracts or parcels of land situate in the Counties of Merced and Stanislaus, State of California, which are particularly described in a certain Schedule, which is hereto annexed, marked "Schedule A," and made a part of this complaint, and it and its grantors have been during all of such time in the actual, continuous and exclusive possession thereof, holding the same under claim of title exclusive of other

rights, founding such claim upon written instruments as being conveyances of the said lands, and holding said lands adversely to all the world, and all of said lands described in paragraphs 1 and 2 of said "Schedule A" are a part of two Mexican grants, known as Rancho Sanjon de Santa Rita and Orestimba Rancho, and the title was derived from the Mexican Government.

That said lands so owned and possessed as aforesaid, by said complainant, are situated along and bordering on a natural water course known as Salt Slough, which is a branch of said San Joaquin River, and along and bordering on other numerous channels or water courses, which are branches of and connected with said River, and into and through which the water of said River naturally
4 flow-.

4. That the said San Joaquin River is a natural stream or water course rising in the Sierra Nevada, and debouching from the mountains into the plains of the San Joaquin Valley, whence it flows naturally to and through its main channel, and through said Salt Slough, and numerous other sloughs and natural water courses, through the lands of the complainant described in said "Schedule A."

5. That complainant is informed and believes that the waters of said San Joaquin River naturally flow, and from time immemorial have flowed, and do naturally flow along, by, through, over and upon a greater portion of complainant's lands, thereby irrigating them and making them fit for cultivation and pasture, besides supplying water thereon for stock and for agricultural purposes, and for all other purposes for which an owner of land bordering on a running stream has the right to use the water thereof, and from time immemorial the said waters have done so and would do so now were it not for the diversion, appropriation and consumption of them by the defendant, as hereinafter set forth.

6. The complainant avers that by the natural flow of the waters of the San Joaquin River, as aforesaid, a great part of complainant's said lands have always been wet and naturally irrigated during the winter and spring, so that it has always been possible, without artificial irrigation, to cultivate such portion of said lands, and raise crops and pasture on them, which facts constituted the principal inducement to complainant, and its grantors, to purchase the same: and on the faith that the same would have the benefit of the natural irrigation and overflow, as well as water for other uses, as
5 aforesaid, to which a riparian proprietor is entitled, complainant, and its grantors, paid large sums of money for the same, and have, since the same were so purchased, expended large sums of money in improving the same, and in constructing canals and lateral canals and other works for controlling, regulating and utilizing the water so naturally supplied to said lands.

That said complainant herein and its grantors have under their claim and right as riparian proprietor of said lands bordering on said San Joaquin River and said Salt Slough and other channels and branches thereof, for upwards of twenty years last past, constructed and used numerous canals and ditches to take water from said river,

channels and branches, to irrigate the land of said complainant bordering on said River, channels and branches, and to supply water for stock, domestic and other purposes in connection with said lands and the occupants thereof, and have, during such period of time diverted, appropriated, and used through said canals so constructed as aforesaid, a large volume of water from said San Joaquin River, and from said Salt Slough and from other channels and branches, to irrigate a large acreage of the land described in "Schedule A" and have used said waters to supply water for stock, domestic and other purposes in connection with said land and the occupants thereof.

7. That owing to the nature of the climate and the country, and the slight rainfall where complainant's said lands are situated, the said lands, unless irrigated by water flowing from a distance, are unfit for cultivation and pasture, and that there is no natural irrigation of a greater part of said lands except by the waters flowing down from the Sierra Nevada through the San Joaquin River, as aforesaid, and no means of irrigating a greater portion of said lands at
6 all, save by the water of the San Joaquin River.

8. That during the spring and summer months of every year, there is a large increase in the volume of water flowing down said San Joaquin River, caused by the melting of the snow in the Sierra Nevada. That the increased flow or flood water coming down said River at such times has, as complainant is informed and believes, from time immemorial, caused a large portion of the land owned by complainant, and bordering on said Joaquin River, Salt Slough and its other branches and channels, and described in "Schedule A," to annually become and be overflowed for a limited period of time. That the water causing and constituting such overflow, has, each year brought down from the mountains and valleys, through which said river flows in its course to said lands, material which has annually fertilized and enriched the land that has by such waters been flooded and overflowed as aforesaid, and that such fertilizing and enriching of said lands has caused the said lands to annually yield increased crops of grasses and food, and increased crops of cereals and other crops to which the same have, when cultivated, been planted; and has also largely increased the value of said lands. That such annual flooding and overflowing of such lands, has also so wet and irrigated the land so flooded and overflowed that it would and has annually grown increased, large, and valuable crops of grasses and feed for stock without further irrigation, when it would have grown little or no feed or crops had it not been so flooded or overflowed, unless it were otherwise irrigated. That such annual flooding and overflowing of such land has also so wet and irrigated the land so flooded and overflowed, that a portion thereof, after the flood water had receded, could be, and has been for many
7 years last past, cultivated, and crops raised thereon without further irrigation, and which, but for such flooding and overflow, could not have been cultivated and crops raised thereon, unless such land were otherwise irrigated.

That if such increased volume of water, coming down said San

Joaquin River at such season of the melting of the snow in the Sierra Nevada, as aforesaid, be diverted from said River by defendant herein, and such water be not permitted to flow down to and annually overflow, wet, and irrigate the portion of lands described in "Schedule A," which it has heretofore so annually been accustomed to overflow, wet and irrigate, as alleged herein, complainant will be deprived of and lose the valuable and increased pasture, and feed, and crops, which it has annually, and for many years last past, received from said lands, and had the benefit of, and resulting from such annual flooding, overflowing, wetting and irrigating of said lands.

That it will also be deprived of and lose the valuable and increased pasture and feed and crops which it has annually and for many years last past received from said lands, and had the benefit of, and resulting from the fertilizing and enriching of said lands by the material brought to and deposited upon said lands by the waters of the San Joaquin River, at the time of such flooding and overflowing thereof, as hereinbefore alleged.

And complainant further avers that said lands will deteriorate in quality and become of less value, and instead of possessing or being of the value that said lands now are, by reason of being capable of producing, annually, large and valuable crops, will depreciate in value.

9. That the taking of water from the said San Joaquin River at or during such period of flood will produce great and ir-
8 reparable injury to the complainant. That it will be impossible to estimate the loss and injury to complainant which will result from the reduction and loss of pasture, feed, and crops, and the loss and injury to complainant by reason of said lands failing to be annually enriched and fertilized by such flooding, and by reason of said land not being annually irrigated and wet by such flooding and overflowing as hereinbefore alleged.

10. That the defendant, well knowing the premises and intending to injure the complainant and its said lands, has wrongfully dug away and removed a part of the bank of said San Joaquin River at a point in or near Section Seventeen (17), in Township Nine (9) South of Range Twelve (12) East, Mount Diablo Base and Meridian, above the said lands of complainant, and constructed a canal or ditch running away from said river at that point, and known as the East Side Canal, and by means of dams, levees, sticks, earth and other obstructions, by it wrongfully placed in the bed and channel of said San Joaquin River, obstructed the flow of said River, and of the water which the complainant was and is entitled to, as aforesaid, to have flow down, to, through, and by the complainant's lands as the same had been and was of right accustomed to flow, and diverted a portion of the water of said San Joaquin River into, and caused the same to run down the aforesaid canal so constructed by the defendant, and consumed the same, and prevented such water from flowing to, along, by, through, over or upon complainant's said lands, as it naturally would have done had *had* it not been so diverted, and that defendant has ever since claimed the right so to divert and

appropriate and consume such water and has ever since continued to do so, and is doing so still.

11. That as complainant is informed and believes, all of the water so diverted and taken from said river by defendant the East Side Canal and Irrigation Company, is water which the complainant has the right to have flow in said river, and in said Salt Slough, and in the other branches and channels of said River, and to, through, along, by and over said complainant's lands, which are described in Schedule "A" hereto annexed, and which it has the right to use as riparian owner of lands bordering on the San Joaquin River and said Salt Slough and on other branches and channels of said San Joaquin River.

12. That as complainant is informed and believes, and therefore avers, the lands, to irrigate which the defendant has diverted and is diverting the water as aforesaid, are not, and never have been, within the memory of man, naturally irrigated at all by any of the waters of said San Joaquin River, nor is any of said land riparian to said river.

13. That the diversion of said waters by said defendant as hereinbefore set forth, will cause great and irreparable damage to complainant, in that the lands described in "Schedule A" annexed to this complaint, will not be supplied with water sufficient for their successful cultivation, and the said crops heretofore sowed and planted upon said lands, as hereinbefore set forth, will dry up and be destroyed, and be rendered valueless, and the cattle pastured on said lands will be deprived of water sufficient for their needs, and large numbers of them will die and be destroyed, and said pasture will be greatly damaged, and the value of said land will be greatly depreciated, and the said complainant will not receive the amount of water which it is entitled to receive as a riparian proprietor owning lands on and along said San Joaquin River and Salt Slough and its other branches and channels to irrigate said lands, and for such other purposes as a riparian proprietor is entitled to have and receive water from a water course running through such riparian lands.

That it will be impossible to estimate the exact value of said crops and pasturage, which, but for such proposed unlawful taking of the waters by defendant as aforesaid, would be sown, raised and used, and that a large proportion of the crops and pasturage of the said irrigated lands would be dried up, killed and destroyed, and the actual damage therefrom is not susceptible of accurate measurement, and it would be impossible to estimate the amount or extent of the depreciation of the value of such lands, and complainant cannot obtain adequate relief in an action at law.

14. That said defendant continues, and threatens to continue the maintenance of said dam and other obstructions in said River as aforesaid, and the wrongful diversion of said water, as aforesaid, to the further, great, inestimable and irreparable damage of complainant.

15. That the matter in dispute herein, to wit: the aforesaid rights

of the complainant so infringed by the aforesaid acts of said defendant, exceeds, exclusive of interest and costs, the value of $5,000.

And complainant alleges that all of the said acts, doings, and claims of the said defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end therefore that the said complainant
11 may have that relief which it can obtain only in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the complainant, and that it be adjudged and decreed by this court that the defendant has no right to obstruct the waters of the said San Joaquin River or any portion thereof by dams, levees, sticks, earth or otherwise or to divert them in any manner or at any point so as to affect their natural flow down, to, through, and over the said lands of complainant to the prejudice of the riparian rights of the complainant as owner of the lands aforesaid, and that the said defendant be forever enjoined and restrained from diverting or obstructing the waters of the said San Joaquin River by dams, levees, sticks or earth placed in the bed or channel of said river or otherwise, and from maintaining, strengthening, completing or enlarging any dam or levee which has already been begun or erected for the purpose of diverting or obstructing the said waters thereof, and from interfering in any way with the said water above complainant's said land, and from diverting any water from the said river above complainant's said land in such manner or to such extent as to deprive complainant of any of the water aforesaid, and that complainant may have such other or further relief as the nature of the case may require and to your Honors may seem meet,

May it please your Honors to grant unto the complainant a writ of subpœna, to be directed to said defendant the East Side Canal and Irrigation Company, commanding it, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further or other direction and decree therein as to this Honorable Court shall seem meet;
12 And may it further please your Honors, during the pendency of this suit, to issue your writ of injunction enjoining and restraining the said defendant, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, during the pendency of this suit, and until the further order of the Court, from doing all or any of the acts aforesaid;

And may it further please your Honors to make and issue an order requiring the said defendant, the East Side Canal and Irrigation Company, a corporation, to show cause before this Honorable Court, at a time and place therein fixed, why such writ of injunction *pendente lite,* as above prayed for, should not be issued; and at the

same time and as a part of such order, to issue your temporary restraining order enjoining and restraining the said defendant, its agents, servants, and attorneys, and all persons acting in aid of them of either of them until the hearing of such order to show cause, and until the further order of this Court, from doing all or any of the acts aforesaid.

[SEAL.] MILLER & LUX, INCORPORATED,
Complainant.
By J. LEROY NICKEL, *Vice-President.*
DAVID BROWN, *Secretary.*

W. C. VAN FLEET.
W. B. TREADWELL,
Solicitors for Complainant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. Leroy Nickel being duly sworn upon his oath deposes and says: that he is the Vice-President of Miller & Lux, Incorporated, a corporation, the complainant above named; that he has
13 read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes the same to be true.

J. LEROY NICKEL.

Subscribed and sworn to before me this 14 day of June 1905.
[SEAL.] GEO. T. KNOX,
Notary Public.

14 SCHEDULE "A."

1st. That portion of the Mexican Grant known as the Rancho Sanjon de Santa Rita which is described as follows: Commencing at a point on the San Joaquin River in Township 8 South, Range 11 East, Mount Diablo Base and Meridian, and near Dickenson's Ferry, where the North line of said Rancho connects with said River; thence West along the North line of said Rancho to the Southwest corner of Section Twenty-four (24) in Township 8 South, Range 10 East, Mount Diablo Base and Meridian; thence South along the East line of Sections 26 and 35 in said Township, and the East line of Sections 2 and 11 in Township 9 South of Range 10 East, Mount Diablo Base and Meridian to the southeast corner of said Section 11; thence in a Southeasterly direction five miles more or less, to the northeast corner of Section 4 in Township 10 South Range 11 East, Mount Diablo Base and Meridian; thence northeasterly 6 miles more or less to a point on the San Joaquin River South of and opposite the head of the canal of the East Side Canal and Irrigation Company; thence in a Northwesterly course following the meanderings of said San Joaquin River which forms the eastern boundary of said Rancho, to the place of beginning, said tract of land containing

20,000 acres of land more or less, and being a portion of said Rancho Sanjon de Santa Rita.

2nd. That portion of the Mexican Grant known as the Orestimba Rancho which is described as follows:

Beginning on the east line of Sec. 19 in T. 7 S. R. 9 E., M. D. M., at a point 9.75 chains north from quarter section corner common to Sections 19 and 20, thence N. 39° 30' E. 25.5 chains more or less to the San Joaquin River; thence up said river following its meanderings to the point where said river intersects the east boundary line of said rancho; thence south along the east boundary line of said rancho to the southeast corner thereof; thence west 3¼ miles more or less along the south boundary line of said rancho to the southwest corner of the southeast quarter of the northeast quarter of Section 4, T. 8, S. R. 9 E. thence north 80 chains; thence west 20 chains; north 80 chains; west 40 chains; north 40 chains; west 60 chains; north 40 chains; west 20 chains; and north 9.75 chains to the place of beginning; excepting 17.21 acres in Section 9 conveyed to Isaac Friedlander by a certain deed dated March 2d, 1876, and 1.15 acres in Section 9 conveyed to John M. McPike by a certain deed dated March 2d, 1876; the tract hereby intended to be described being the same tracts of land conveyed to Henry Miller and Charles Lux by John M. McPike, by deed dated October 22, 1868, recorded in Merced County on November 2d, 1868; by John M. McPike by deed dated September 26th, 1871, recorded in Merced County on October 26th, 1871; by Isaac Friedlander by deed dated July 23rd, 1873, recorded in Merced County on January 16th, 1874, and in Stanislaus County on January 20th, 1874; by Isaac Lankershim by deed dated April 3rd, 1874, recorded in Merced County on May 20th, 1874, and in Stanislaus County on May 22nd, 1874; and by George Linn by deed dated November 11th, 1873, recorded in Merced County on November 12th, 1873, and being a portion of said Rancho Orestimba, containing 8000 acres, more or less.

3rd. All of the land in Township 7 South, Range 10 East, M. D. M., lying south and west of the San Joaquin River.

4th. All of the following described land in Township 8 South, Range 9, East, M. D. M.

The south half of Section 1.

The south half of section 2.

All of Sections 11, 12, 13 and 14.

5th. All of the following described land in Township 8 South, Range 10 East, M. D. M.:

All of the land in said Township lying south and west of the San Joaquin River, except sections 25 and 36.

Of section 12, all of the land included in Swamp and Overflowed Land Surveys Nos. 223, 243, and 285.

Of section 13, all of the land included in Swamp and Overflowed Land Survey No. 222.

6th. All of the following described land in Township 8 South, Range 11 East, M. D. M.

Of section 7, the west half of the southwest quarter.

Of section 18, the north half of the southwest quarter and the northwest quarter.

Of section 19 the northwest quarter of the northeast quarter.

Of section 20 Lot 7 and the southwest quarter of the northeast quarter.

Also all of sections 18, 19, and 20, lying south and west of the San Joaquin River.

Of section 28 the N. E. ¼ of the N. W. ¼, N. ½ of N. E. ¼ and S. E. ¼ of the N. E. ¼.

Swamp and Overflowed Land Survey No. 195, and Swamp and Overflowed Land Survey No. 194, excepting five acres beginning at the southeast corner of the N. E. ¼ of the S. E. ¼ of section 28, thence W. 10 chains, thence N. 45° E. 14.14 chains, thence S. 10 chains to the place of beginning.

Of section 33 all of the land included in Swamp and Overflowed Land Survey No. 205.

7th. In Township Nine, South, Range 11 East, M. D. M. the following described land:

Of sections 3 and 4 all of the land included in Swamp and overflowed Land Survey 325.

Of Section 10 all of the land included in Swamp and Overflowed Land Survey No. 327.

8th. In Township 9, South, Range 10 East, M. D. M., the following described land:

17 All of sections 2, 3, 4, 10, 11, 14, 15, 22, 23, 24, 25, 26 and 36, except the southeast quarter of section 26.

9th. In Township 9, South, Range 11 East M. D. M., the following described land:

Commencing at the southwest corner of said Township, thence East three miles, more or less, to the Northeast corner of section 4, in Township 10 South, Range 11 East, M. D. M., thence Northeasterly four miles more or less to the Northeast corner of section 24, in Township 9 South, Range 10 East, M. D. M., thence South three miles more or less to the place of beginning.

(Endorsed:) No. 92. Dep't — Circuit Court of the United States, Southern District of California, Northern Division. Miller & Lux, Incorporated, Complainant, *v.* The East Side Canal & Irrigation Co., Defendant. Bill of Complaint. Filed Jun- 15, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. W. C. Van Fleet & W. B. Treadwell, 517 Mills Building, San Francisco, Cal., Solicitors for Complainant.

18 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division.

In Equity.

The President of the United States of America to The East Side Canal and Irrigation Company, a corporation, Greeting:

You are hereby commanded, That you be and appear in said Circuit Court of the United States aforesaid, at the Court Room in Fresno on the 7th day of August A. D. 1905, to answer a Bill of Complaint exhibited against you in said Court by Miller & Lux, Incorporated, a corporation formed, organized and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, Nevada, and a citizen of the State of Nevada, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of June in the year of our Lord one thousand nine hundred and five and of our Independence the one hundred and twenty-ninth.

[SEAL.] WM. M. VAN DYKE, *Clerk*,
By CHAS. N. WILLIAMS,
Deputy Clerk.

19 *Memorandum Pursuant to Rule* 12, *Supreme Court U. S.*

You are hereby required, to enter your appearance in the above suit, on or before the first Monday of August next, at the Clerk's Office of said Court pursuant to said Bill; otherwise the said Bill will be taken *pro confesso*.

WM. M. VAN DYKE, *Clerk*,
By CHAS. N. WILLIAMS,
Deputy Clerk.

Clerk's Office, Los Angeles, California.

UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify, that I received the within writ on the 16th day of June 1905, and personally served the same on the 17th day of June 1905, on The East Side Canal and Irrigation Company, a corporation by delivering to and leaving with James J. Stevinson President of — said defendant named therein, personally, at the County of Merced in said district, a copy thereof.

H. Z. OSBORNE,
U. S. Marshal.
By L. P. TRIMMINS, *Deputy.*

Fresno, June 19th, 1905.

(Endorsed:) Original. Marshal's Doc. No. 763. No. 92. U. S. Circuit Court Ninth Circuit. Southern District of California, Northern Division. In equity. Miller & Lux, Incorporated, *vs.* The East Side Canal & Irrigation Co. Subpœna. Filed Jun- 20, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. W. C. Van Fleet & W. B. Treadwell, Mills Bldg., S. F., sols. for complainant.

In the Circuit Court of the United States for the Southern District of California, Northern Division.

In Equity.

MILLER & LUX, INCORPORATED, a Corporation, Complainant,
vs.
THE EAST SIDE CANAL AND IRRIGATION COMPANY, a Corporation, Defendant.

Amended Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Southern District of California, Northern Division:

Miller & Lux, Incorporated, a corporation formed, organized, and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, State of Nevada, and a citizen of the State of Nevada, brings this its amended bill against The East Side Canal and Irrigation Company, a corporation organized and existing under the laws of the State of California, and a citizen of the State of California; and thereupon your orator complains and says:

I. That said complainant is a corporation formed, organized and existing under the laws of the State of Nevada, and has its principal place of business at Carson City in the State of Nevada, and is a citizen of the State of Nevada.

21 2. That the defendant The East Side Canal and Irrigation Company is a corporation formed, organized and existing under the laws of the State of California, and has its principal place of business in the County of Merced, in the State of California, in the Southern District of California, and within the Northern Division thereof, and is a citizen of the State of California.

3. That complainant herein, Miller & Lux, Incorporated, is, and its grantors for more than twenty-five years last past, have been the owners in fee and seized and possessed of all those certain tracts or parcels of land situate in the Counties of Merced and Stanislaus, State of California, which are particularly described in a certain schedule, which is hereto annexed, marked "Schedule A," and made a part of this complaint, and it and its grantors have been during all of such time in the actual, continuous and exclusive possession thereof, holding the same under claim of title exclusive of other rights, founding such claim upon written instruments as

being conveyances of the said lands, and holding said lands adversely to all the world, and all of said land described in paragraph 1 of said "Schedule A" is a part of a Mexican grant known as Orestimba Rancho, and the title was derived from the Mexican Government.

That said lands so owned and possessed as aforesaid, by said complainant, are situated along and bordering on a natural water course known as the San Joaquin River, and also on a natural water course known as Salt Slough, which is a branch of said San Joaquin River, and also along and bordering on other numerous natural channels or water courses, which are branches of and connected with said river and said Salt Slough, and into and through which the waters of said river naturally flow.

22 4. That the said San Joaquin River is a natural stream or water course rising in the Sierra Nevada, and debouching from the mountains into the plains of the San Joaquin Valley, whence it flows naturally to and through its main channel, and through said Salt Slough, and numerous other sloughs and natural water courses, through the lands of the complainant described in said "Schedule A".

5. That the waters of said San Joaquin River naturally flow, and from time immemorial have flowed, and do naturally flow along, by, through, over and upon complainant's said lands, thereby irrigating the greater part of said lands and making them fit for cultivation and pasture, besides supplying water thereon for stock and for agricultural purposes, and for all other purposes for which an owner of land bordering on a running stream has the right to use the water thereof, and from time immemorial the said waters have done so and would do so now were it not for the diversion, appropriation and consumption of them by the defendant, as hereinafter set forth.

6. The complainant avers that by the natural flow of the waters of the San Joaquin River, as aforesaid, a great part of complainant's said lands have always been wet and naturally irrigated during the winter and spring, so that it has always been possible, without artificial irrigation, to cultivate such portion of said lands, and raise crops and pasture on them, which facts constituted the principal inducement to complainant, and its grantors, to purchase the same; and on the faith that the same would have the benefit of the natural irrigation and overflow, as well as water for other uses, as aforesaid, to which a riparian proprietor is entitled, complainant, and its grantors, paid large sums of money for the same, and have

23 since the same were so purchased, expended large sums of money in improving the same; and in constructing canals and lateral canals and other works for controlling, regulating and utilizing the water so naturally supplied to said lands.

That said complainant herein and its grantors have under their claim and right as riparian proprietor of said lands bordering on said San Joaquin River and said Salt Slough and other channels and branches thereof, for upwards of twenty years last past, constructed and used numerous canals and ditches to take water from said river, channels and branches, to irrigate the land of said complainant

bordering on said river, channels and branches, and to supply water for stock, domestic and other purposes in connection with said lands and the occupants thereof, and have, during such period of time diverted, appropriated, and used through said canals so constructed as aforesaid, a large volume of water from said San Joaquin River, and from said Salt Slough and from other channels and branches, to irrigate a large acreage of the land described in "Schedule A" and have used said waters to supply water for stock, domestic and other purposes in connection with said land and the occupants thereof.

7. That owing to the nature of the climate and the country, and the slight rainfall where complainant's said lands are situated, the said lands, unless irrigated by water flowing from a distance, are unfit for cultivation and pasture, and that there is no natural irrigation of a greater part of said lands except by the waters flowing down from the Sierra Nevada through the San Joaquin River, as aforesaid, and no means of irrigating a greater portion of said lands at all, save by the water of the San Joaquin River.

24 8. That during the spring and summer months of every year, there is a large increase in the volume of water flowing down said San Joaquin River, caused by the melting of the snow in the Sierra Nevada. That the increased flow of water coming down said River at such times has, as complainant is informed and believes, from time immemorial, caused a large portion of the land owned by complainant, and bordering on said San Joaquin River, Salt Slough and its other branches and channels, and described in "Schedule A", to annually become and be overflowed for a limited period of time. That the water causing and constituting such overflow, has, each year brought down from the mountains and valleys, through which said river flows in its course to said lands, material which has annually fertilized and enriched the land that has by such waters been overflowed as aforesaid, and that such fertilizing and enriching of said lands has caused the said lands to annually yield increased crops of grasses and food, and increased crops of cereals and other crops to which the same have, when cultivated, been planted; and has also largely increased the value of said lands. That such annual overflowing of such lands has also so wet and irrigated the land so overflowed that it would and has annually grown increased, large and valuable crops of grasses and feed for stock without further irrigation, when it would have grown little or no feed or crops had it not been so overflowed, unless it were otherwise irrigated. That such annual overflowing of such lands has also so wet and irrigated the land so overflowed, that a portion thereof, after the increased flow of water had receded, could be, and has been for many years last past, cultivated, and crops raised thereon, without further irrigation, and which, but for such overflow, could

25 not have been cultivated and crops raised thereon, unless such land were otherwise irrigated.

That if such increased volume of water, coming down said San Joaquin River at such season of the melting of the snow in the Sierra Nevada, as aforesaid, be diverted from said river by defendant

herein, and such water be not permitted to flow down to and annually overflow, wet, and irrigate the portion of lands described in "Schedule A", which it has heretofore so annually been accustomed to overflow, wet and irrigate, as alleged herein, complainant will be deprived of and lose the valuable and increased pasture, and feed and crops, which it has annually, and for many years last past, received from said lands, and had the benefit of, and resulting from such annual overflowing, wetting and irrigating of said lands.

That it will also be deprived of and lose the valuable and increased pasture and feed and crops which it has annually and for many years last past received from said lands, and had the benefit of, and resulting from the fertilizing and enriching of said lands by the material brought to and deposited upon said lands by the waters of the San Joaquin River, at the time of such overflowing thereof, as hereinbefore alleged.

And complainant further avers that said lands will deteriorate in quality and become of less value, and instead of possession or being of the value that said lands now are, by reason of being capable of producing, annually, large and valuable crops, will depreciate in value.

9. That the taking of water from the said San Joaquin River at or during such period of increased flow will produce great and irreparable injury to the complainant. That it will be impos-
26 sible to estimate the loss and injury to complainant which will result from the reduction and loss of pasture, feed and crops, and the loss and injury to complainant by reason of said lands failing to be annually enriched and fertilized by such overflow, and by reason of said land not being annually irrigated and wet by such overflowing as hereinbefore alleged.

10. That the defendant, well knowing the premises and intending to injure the complainant and its said lands, has wrongfully dug away and removed a part of the bank of said San Joaquin River at a point in or near Section Seventeen (17), in Township Nine (9) South of Range Twelve (12) East, Mount Diablo Base and Meridian, above the said lands of complainant, and constructed a canal or ditch running away from said river at that point, and known as the East Side Canal, and by means of dams, levees, sticks, earth and other obstructions, by it wrongfully placed in the bed and channel of said San Joaquin River, obstructed the flow of said river, and of the water which the complainant was and is entitled to, as aforesaid, to have flow down, to, through, and by the complainant's lands as the same had been and was of right accustomed to flow, and diverted a portion of the water of said San Joaquin River into, and caused the same to run down the aforesaid canal so constructed by the defendant, and consumed the same, and prevented such water from overflowing to, and along, by, through, over or upon complainant's said lands, as it naturally would have done had it not been so diverted, and that defendant has ever since claimed the right so to divert and appropriate and consume such water and has ever since continued to do so, and is doing so still.

11. That all of the water so diverted and taken from said
27 river by defendant the East Side Canal and Irrigation Company, is water which the complainant has the right to have flow in said river, and in said Salt Slough, and in the other branches and channels of said river, and to, through, along, by and over said complainant's lands, which are described in "Schedule A" hereto annexed, and which it has the right to use as riparian owner of lands bordering on the San Joaquin River and said Salt Slough and on other branches and channels of said San Joaquin River.

12. That as complainant is informed and believes, and therefore avers, the lands, to irrigate which the defendant has diverted and is diverting the water as aforesaid, are not, and never have been, within the memory of man, naturally irrigated at all by any of the waters of said San Joaquin River, nor is any of said land riparian to said river.

13. That the diversion of said waters by said defendant as hereinbefore set forth, will cause great and irreparable damage to complainant, in that the lands described in "Schedule A" annexed to this complaint, will not be supplied with water sufficient for their successful cultivation, and the said crops heretofore sowed and planted upon said lands, as hereinbefore set forth, will dry up and be destroyed, and be rendered valueless, and the cattle pastured on said lands will be deprived of water sufficient for their needs, and large numbers of them will die and be destroyed, and said pasture will be greatly damaged, and the value of said land will be greatly depreciated, and the said complainant will not receive the amount of water which it is entitled to receive as a riparian proprietor owning lands on and along said San Joaquin River and Salt Slough and its other branches and channels to irrigate said lands, and for such other purposes as a riparian proprietor is entitled to
28 have and receive water from a water course running through such riparian lands.

That it will be impossible to estimate the exact value of said crops and pasturage, which, but for such proposed unlawful taking of the waters by defendant as aforesaid, would be sown, raised and used, and that a large proportion of the crops and pasturage of the said irrigated lands would be dried up, killed and destroyed, and the actual damage therefrom is not susceptible of accurate measurement, and it would be impossible to estimate the amount or extent of the depreciation of the value of such lands, and complainant cannot obtain adequate relief in an action at law.

14. That said defendant continues, and threatens to continue the maintenance of said dam and other obstructions in said river as aforesaid, and the wrongful diversion of said water, as aforesaid, to the further, great, inestimable and irreparable damage of complainant.

That complainant is informed and believes, and therefore avers, that said defendant claims and asserts the right to divert a certain quantity of the waters of said river through the canal of defendant above mentioned, and claims and asserts the right to construct and maintain a dam or dams at the head of certain of the natural

branches of the main channel of said river, which branches of said river run down to and connect with said Salt Slough and the branches and channels thereof and carry a portion of the waters of said river down to and through said Salt Slough and the branches and channels thereof, and thence down to and through and over the said lands of the complainant; that by means of said dam or dams the defendant will obstruct and prevent the flow of any of
29 the water of said river into said branches of said river, and cause said waters of said river to flow down the main channel of said river to the head of said canal of defendant, and to be diverted into said canal and away from said lands of complainant, to land not riparian to said river; that said claims of said defendant are and each of them is without right and wholly wrongful, and that the defendant has not the right to divert any of the waters of said river, or to obstruct the flow of said river into any of the branches or channels thereof above the said lands of complainant, so as to interfere with the flow of said waters down to said lands of complainant.

15. That the matter in dispute herein, to wit: the aforesaid rights of the complainant so infringed by the aforesaid acts of said defendant, exceeds, exclusive of interest and costs, the value of $5,000.00.

And complaint alleges that all of said acts, doings, and claims of the said defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end therefore that the said complainant may have that relief which it can obtain only in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the complainant, and that it be adjudged and decreed by this court that the defendant has no right to obstruct the waters of the said San Joaquin River, or any portion thereof, or to obstruct the water which naturally flows from
30 said river into any of the channels of said river down to said lands of complainant by dams, levees, sticks, earth or otherwise, or to divert any of the waters of said river in any manner or at any point so as to affect or interfere with their flow down said river, or any of the channels of said river, to, through and over the said lands of complainant, and that the said defendant be forever enjoined and restrained from diverting or obstructing the waters of the said San Joaquin River, or any of the channels of said river, by dams, levees, sticks, or earth placed in the bed of said river, or at or in any of the channels of said river, or otherwise, so as to affect the water flowing down to said lands of complainant, and from maintaining, strengthening, completing or enlarging any dam or levee which has already been begun or erected for the purpose of diverting or obstructing the said waters and from interfering in any way with the said waters above complainant's said land, and from diverting any water from the said river above complainant's said land, and

that defendant be required to remove all obstructions of every kind placed by it in the bed of said river, or in any of the channels of said river, or any of its branches or tributaries, which interfere with the flow of the water of said river down to said lands of complainant, and that complainant may have such other or further relief as the nature of the case may require, and to your Honors may seem meet.

May it please your Honors to grant unto the complainant a writ of subpœna, to be directed to said defendant the East Side Canal and Irrigation Company, commanding it, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to
31 stand to, perform, and abide such further or other direction and decree therein as to this Honorable Court shall seem meet;

And may it further please your Honors, during the pendency of this suit, to issue your writ of injunction enjoining and restraining the said defendants, its agents, servants, and attorneys, and all persons acting in aid of them or either of them, during the pendency of this suit, and until the further order of the court, from doing all or any of the acts aforesaid;

And may it further please your Honors to make and issue an order requiring the said defendant, the East Side Canal and Irrigation Company, a corporation, to show cause before this Honorable Court, at a time and place therein fixed, why such writ of injunction *pendente lite*, as above prayed for, should not be issued; and at the same time and as a part of such order, to issue your temporary restraining order enjoining and restraining the said defendant, its agents, servants, and attorneys, and all persons acting in aid of them or either of them until the hearing of such order to show cause, and until the further order of this court, from doing all or any of the acts aforesaid.

[SEAL.] MILLER & LUX, INCORPORATED,
[CORPORATE SEAL.] *Complainant.*
By J. LEROY NICKEL,
Its Vice-President, and
DAVID BROWN, *Its Secretary.*

R. E. HOUGHTON,
Solicitor for Complainant.

32 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. Leroy Nickel, being duly sworn upon his oath, deposes and says: That he is the Vice-President of Miller & Lux, Incorporated, a corporation, the complainant above named; that he has read the foregoing amended bill of complaint in the above entitled suit and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters, he believes the same to be true.

J. LEROY NICKEL.

Subscribed and sworn to before me this 12th day of January, 1906.

GEO. T. KNOX,

Notary Public in and for the City and County of San Francisco, State of California.

[SEAL.]

33 "SCHEDULE A."

1st. That portion of the Mexican Grant known as the Orestimba Rancho which is described as follows:

Beginning on the east line of Sec. 19 in T. 7 S. R. 9 E., M. D. M., at a point 9.75 chains north from quarter section corner common to Sections 19 and 20, thence N. 39 30' E. 256 chains more or less to the San Joaquin River; thence up said river following the meanderings to the point where said river intersects the east boundary line of said rancho; thence south along the east boundary line of said rancho to the southeast corner thereof; thence west 3¼ miles more or less along the south boundary line of said rancho to the southwest corner of the southeast quarter of the northeast quarter of Section 4, T. 8. S. R. 9 E., thence north 80 chains; thence west 20 chains; north 80 chains; west 40 chains; north 40 chains; west 60 chains; north 40 chains; west 20 chains; and north 9.75 chains to the place of beginning; excepting 17.21 acres in Section 9 conveyed to Isaac Friedlander by a certain deed dated March 2d, 1876, and 1.15 acres in Section 9 conveyed to John M. McPike by a certain deed dated March 2d, 1876; the tract hereby intended to be described being the same tracts of land conveyed to Henry Miller and Charles Lux by John M. McPike, by deed dated October 22d, 1868, recorded in Merced County on November 2d, 1868; by John M. McPike by deed dated September 26th, 1871, recorded in Merced County on October 26th, 1871; by Isaac Friedlander by deed dated July 23rd, 1873, recorded in Merced County on January 16th, 1874; and in Stanislaus County on January 20th, 1874; by Isaac Lankershim by deed dated April 3rd, 1874, recorded in Merced County on May 20th, 1874, and in Stanislaus County on May 22d, 1874; and by George Linn by deed dated November 11th, 1873, re-
34 corded in Merced County on November 12th, 1873, and being a portion of said Rancho Orestimba, containing 8,000 acres, more or less.

2nd. All of the land in Township South, Range 10 East, M. D. M., lying south and west of the San Joaquin River.

3rd. All of the following described land in Township 8 south, Range 9 East, M. D. M.

The south half of Section 1.

The south half of Section 2.

All of Sections 11, 12, 13 and 14.

4th. All of the following described land in Township 8 south, Range 10, east, M. D. M.

All of the land in said Township lying south and west of the San Joaquin River, except Sections 25 and 36.

Of Section 12, all of the land included in Swamp and Overflowed Land Surveys Nos. 223, 243, and 286.

Of Section 13, all of the land included in Swamp and Overflowed Land Survey No. 222.

5th. All of the following described land in Township 8 south, Range 11 East, M. D. M.

Of Section 7, the west half of the southwest quarter.

Of Section 18, the north half of the southwest quarter and the northwest quarter.

Of Section 19 the northeast quarter of the northeast quarter.

Of Section 20 Lot 7 and the southwest quarter of the northeast quarter.

Also all of Sections 18, 19 and 20, lying south and west of the San Joaquin River.

Of Section 28 the N. E. ¼ of the N. W. ¼, N. ½ of N. E. ¼ and S. E. ¼ of N. E. ¼.

Swamp and Overflowed Land Survey No. 195, and Swamp and Overflowed Land Survey No. 194, excepting five acres
35 beginning at the southeast corner of the N. E. ¼ of the S. E. ¼ of Section 28, thence W. 10 chains, thence N. 45° E. 14.14 chains, thence S. 10 chains to the place of beginning.

Of Section 33 all of the land included in Swamp and Overflowed Land Survey No. 205.

6th. In Township Nine, South, Range 11 East M. D. M. the following described land:

Of Sections 3 and 4 all of the land included in Swamp and Overflowed Land Survey 325.

Of Section 10 all of the land included in Swamp and Overflowed Land Survey No. 327.

7th. In Township 9, South, Range 10 East, M. D. M., the following described land:

All of sections 2, 3, 4, 10, 11, 14, 15, 22, 23, 24, 25, 26, and 36, except the southeast quarter of Section 26.

8th. In Township 9, South, Range 11 East M. D. M., the following described land:

Commencing at the southwest corner of said Township, thence East three miles, more or less, to the northeast corner of Section 4, in Township 10 south, Range 11 East M. D. M., thence northeasterly four miles more or less to the northeast corner of Section 24, in Township 9 south, Range 10 East, M. D. M., thence south three miles more or less to the place of beginning.

(Endorsed:) No. 92. In the U. S. Circuit Court, Southern District of California, Northern Division. Miller & Lux, Incorporated, Complainants, *vs.* The East Side Canal and Irrigation Company, Defendants. Amended Bill of Complaint. Due service of within Amended Bill of Complaint admitted this 12th day of January, 1906. James F. Peck, Solicitor for Defendant. Filed Jan. 15, 1906. Wm. M. Van Lyke, Clerk. Chas. N. Williams Deputy. Houghton & Houghton, Solicitors for Complainant, Mills Building, San Francisco, Cal.

36 In the Circuit Court of the United States for the Southern District of California, Northern Division.

In Equity.

MILLER & LUX, INCORPORATED, a Corporation, Complainant,
vs.
THE EAST SIDE CANAL AND IRRIGATION COMPANY, a Corporation, Defendant.

Supplemental Bill.

To the Judges of the Circuit Court of the United States, for the Southern District of California, Northern Division:

Miller & Lux, Incorporated, a corporation formed, organized and existing under the laws of the State of Nevada, and having its principal place of business at Carson City, State of Nevada, and a citizen of the State of Nevada, brings this its supplemental bill against The East Side Canal and Irrigation Company, a corporation organized and existing under the laws of the State of California, and a citizen of the State of California; and thereupon your orator complains and says:

1. That complainant filed its original bill against the defendant in this Court on the 15th day of June, 1905, for the purpose of enjoining the defendant from obstructing the flow of the waters of the San Joaquin River and of the channels of said river, by dams or otherwise, or diverting any of the waters of said river or affecting the natural flow down to the lands of the complainant riparian to said river and the various channels thereof, or from interfer-
37 ing in any way with the waters of said river above said lands of the complainant, and for other relief, as stated in said bill.

2. Complainant further shows that since the filing of said bill, to-wit: in the month of August, 1905, the defendant wrongfully and without right constructed a dam at and across the head of a certain natural branch channel of said San Joaquin River known as Deep Slough, the head of said slough being about five miles above the head of defendant's canal known as the East Side Canal; that the bottom of said Deep Slough at its head is as low as the bottom of the main channel of said San Joaquin River at the head of said Deep Slough, and is on so low a level that the water flowing in said river will naturally, and from time immemorial has naturally, flowed out of said main channel of said river and through said Deep Slough at all times when there is or has been any water flowing in said main channel of said river at the head of said Deep Slough; that said slough runs in a Northwesterly direction down to and connects with the branch of said river known as Salt Slough; that the portion of the waters of said river so naturally flowing into said Deep Slough is carried through said slough down to and into said Salt Slough, and thence flows through said Salt Slough and the branches and

channels thereof down to and through and over said lands of the complainant; that for many years prior to the commencement of this suit, complainant has used a large part of said water for the irrigation of said lands, and to supply water for stock, domestic and other purposes in connection with said lands, and said water finally empties back into said San Joaquin River below the head of said canal of defendant.

3. That said dam constructed by defendant at and across the head of said Deep Slough obstructed and prevented any
38 water from flowing from said river into said Deep Slough and down to and through and over said lands of complainant as aforesaid, and as said water would have done if said dam had not been constructed by said defendant; that on the 9th day of August, 1905, complainant caused said dam to be removed; that thereafter and some time in said month said defendant wrongfully constructed another dam at and across the head of said Deep Slough, and thereby again prevented any water from flowing into and down said slough as aforesaid, and that said dam was thereafter removed by the complainant.

4. That said defendant constructed said dams and each of them at and across the head of said Deep Slough for the purpose of preventing, and said dams and each of them did prevent, any of the waters of said San Joaquin River from flowing into said slough, and defendant thereby kept and confined such water of said river as naturally would have flowed into said slough in the main channel of said river, and thereby caused the same to flow to the head of said defendant's canal, and defendant did at said point, to-wit: at the head of said canal, divert said water away from said river and through said defendant's canal; that the said dams and each of them were placed at and across the head of said Deep Slough by defendant wholly in aid of and for the purposes of the diversion of the waters of said river made by defendant into and through its said canal.

5. That the said defendant threatens to continue to construct and to reconstruct a dam or dams at and across the head of said Deep Slough, and to prevent the waters of said San Joaquin River from flowing into and through said slough and down to and through and over the said lands of complainant, and the said defendant
39 will, unless enjoined by this Court from so doing, construct and reconstruct another dam or dams at and across the head of said Deep Slough, and thereby wholly prevent any of the waters of said San Joaquin River from flowing into or through said Deep Slough and cause the same to flow down to the head of defendant's said canal and there divert the same away from said river and use and consume the same on lands not riparian to said river or any of the channels thereof, and deprive the complainant of said waters.

6. That complainant is informed and believes and therefore avers that all of the water naturally flowing into and down said Deep Slough as aforesaid is water which the complainant has the right to have flow into said slough and down to, through and over the complainant's said lands, and that complainant has the right to use

said water as riparian owner of lands on said Salt Slough and the said San Joaquin River.

7. And complainant further shows that since the filing of its said bill, defendant has further wrongfully and without right constructed a dam in said river at the head of said East Side Canal of defendant, by means of which dam defendant has obstructed and obstructs the flow of all the water flowing in said river at the head of said canal, and prevented and prevents the waters of said river from flowing down to, along and over complainant's said lands; that said dam was constructed at the time defendant first constructed the dam at and across the head of said Deep Slough, as hereinbefore stated, and all of the water which was prevented by said dam at and across the head of said Deep Slough from flowing into said slough was, by means of said dam, caused to flow down the main channel of said San Joaquin River to the head of said defendant's East Side
40 Canal, and was there diverted by defendant into said East Side Canal and away from said river, and all of said water was used and consumed by defendant on lands not riparian to said river or any of the channels thereof, and complainant was wholly deprived of said water.

8. That said acts of the defendant in preventing waters of said river from flowing into said Deep Slough and down to, through and over said lands of the complainant where they would naturally flow but for said defendant's interference with said slough, has caused and will, if said defendant is not prohibited from so interfering with said slough, cause great and irreparable damage to complainant and to its said lands; that said lands will not be supplied with water sufficient for their successful cultivation, and the crops so planted upon said lands will dry up and be destroyed and be rendered valueless, and the cattle pasturing on said lands will be deprived of water sufficient for their needs, and the complainant will not receive the amount of water which it is entitled to receive as a riparian owner of lands on and along said Salt Slough and on and along Said San Joaquin River, and that it will be impossible to estimate the extent of the damage which complainant will sustain in consequence of said wrongful acts of defendant.

And complainant alleges that all of the said acts, doings, and claims of the said defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and can have relief only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end therefore that the said complainant
41 may have that relief which it can obtain only in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the complainant, and that it be adjudged and decreed by this court that the defendant has no right to *hos*truct the waters of the said San Joaquin River, or any portion thereof in the manner

aforesaid, or to obstruct the water which naturally flows from said river into said Deep Slough and down to said lands of complainant, or into any other channel of said river leading down to said lands of complainant, by dams, levees, sticks, earth or otherwise, or to divert any of the waters of said San Joaquin river in any other manner or at any other point so as to affect or interfere with their flow down said river, or said Deep Slough, or any other channels of said river, to, through and over the said lands of complainant, and that the said defendant be forever enjoined and restrained from diverting or obstructing the waters of the said San Joaquin river, or said Deep Slough, or any other channels of said river, by dams, levees, sticks or earth placed in the bed or channel of said river, or at or in said Deep Slough, or at or in any other channels of said river, or otherwise, so as to affect the water flowing down to said lands of complainant, and from maintaining, strengthening, completing, or enlarging any dam or levee which has already been begun or erected for the purpose of diverting or obstructing the said waters, and from interfering in any way with the said waters above complan*inant*'s said land, and from diverting any water from the said river above complainant's said land, and that defendant be required to remove all obstructions of every kind placed by it in the channel,
42 or any of the channels of said San Joaquin river, or any of its branches or tributaries, which interfere with the flow of the water of said river down to said lands of complainant, and that complainant may have such other or further relief as the nature of the case may require and to your Honors may seem meet.

May it please your Honors to grant unto the complainant a writ of subpœna, to be directed to said defendant the East Side Canal and Irrigation Company, commanding it, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true direct and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further or other direction and decree therein as to this Honorable Court shall seem meet.

And may it further please your Honors, during the pendency of this suit, to issue your writ of injunction enjoining and restraining the said defendant, its agents, servants, and attorneys, and all persons acting in aid of them or either of them during the pendency of this suit, and until the further order of the Court, from doing all or any of the acts aforesaid.

And may it further please your Honors to make and issue an order requiring the said defendant, the East Side Canal and Irrigation Company, a corporation, to show cause before this Honorable Court, at a time and place therein fixed why such writ of *injunction pendente lite*, as above prayed for, should not be issued; and at the same time and as part of such order, to issue your temporary restraining order enjoining and restraining the said defendant,
43 its agents, servants, and attorneys, and all persons acting in aid of them or either of them, until the hearing of such order

to show cause, and until the further order of this Court, from doing all or any of the acts aforesaid.

MILLER & LUX, INCORPORATED,
Complainant,

[CORPORATE SEAL.]

[SEAL.] By J. LEROY NICKEL, *Its Vice-President.*
By DAVID BROWN, *Its Secretary.*

R. E. HOUGHTON,
Solicitor for Complainant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. Leroy Nickel, being duly sworn upon his oath, deposes and says:

That he is the Vice-President of Miller & Lux, Incorporated, a corporation, the complainant above named; that he has read the foregoing supplemental bill and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes the same to be true.

J. LEROY NICKEL.

Subscribed and sworn to before me this 9 day of January, 1906.

[SEAL.] GEO. T. KNOX,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) No. 92 In the U. S. Circuit Court, Southern District of California, Northern Division. Miller & Lux, Incorporated, a corporation, Complainant, *vs.* The East Side Canal and Irrigation Co., a Corporation, Defendant. Supplemental Bill. Filed Feb. 27, 1906. Wm. M. Van Dyke Clerk. Houghton & Houghton, Solicitors for Complainant, Mills Building, San Francisco, Cal.

44 In the Circuit Court of the United States for the Southern District of California, Northern Division.

MILLER & LUX, INCORPORATED, a Corporation, Complainant,
vs.
THE EAST SIDE CANAL & IRRIGATION COMPANY, a Corporation, Defendant.

To the Judges of the Circuit Court of the United States for the Southern District of California, Northern Division:

The defendant, The East Side Canal & Irrigation Company, a corporation, now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the amended and supplemental bill of complaint contained, for an-

swer thereto, or to so much thereof as this defendant is advised it is material, or necessary for him to make answer to, answering said amended bill of complaint and said supplemental bill says as follows:

First. Admits that Miller & Lux, Incorporated, complainant in said suit, is a corporation, formed and organized under the laws of the State of Nevada for the purpose of taking over the property and liquidating the debts and distributing the property of what was heretofore the copartnership of Miller & Lux, as hereinafter stated, and for the benefit of the same persons as were theretofore interested in said copartnership, and said corporation now has its principal place of business at Carson City, State of Nevada and is a citizen of the State of Nevada.

2. Admits that the defendant, The East Side Canal & Irrigation Company is, and at the time of filing the bill of complaint herein was, and for a long time prior thereto had been, a corporation formed, organized and existing under the laws of the State of California, for the purpose among others of appropriating waters and acquiring the title to water, and the right to use water in the State of California for sale, rental and distribution, and said defendant has had its principal place of business in the County of Merced in the State of California, in the Southern District of California, and within the northern Division thereof, and is, and was at the time of filing the bill of complaint herein, and for a long time prior thereto has been, a citizen of the State of California.

3. That as to whether or not the complainant herein is the owner in fee, or seized or possessed of the lands or any part thereof described in Schedule "A" annexed to complainant's bill of complaint herein, defendant has not sufficient information on which to base a belief, and therefore denies that the complainant is the owner in fee, or otherwise, or is seized or is possessed, of said lands, or any part thereof; and as to whether the grantors of complainant for more than twenty-five (25) years last past have been the owners in fee, or seized, or possessed of all, or any part of those lands described in Schedule "A" annexed to complainant's amended bill of complaint;

Defendant has not sufficient information on which to base a belief, and in this particular defendant alleges that all the property owned, or at any time owned, by the complainant was the property conveyed to it by Miller & Lux, a corporation, organized under the laws of the State of California, in the year *1905*, and that all the property of every nature and character, including lands, which was at any time owned by Miller & Lux, a corporation, was the property which was conveyed to said Miller & Lux, a corporation, by all the persons interested in the assets of Miller & Lux, a copartnership, that all of the lands owned by Miller & Lux, a copartnership, were conveyed by all of the persons interested in the assets of Miller & Lux, a copartnership to Miller & Lux, a corporation, about the year 1897, and said property had been theretofore owned by said Miller & Lux a copartnership for more than thirty (30) years, and all the lands now, or at any time,

owned by complainant are and were lands which were owned by Miller & Lux a copartnership for more than twelve (12) years prior to 1897.

That as to whether the complainant and its grantors have been during all or any part of the time alleged in the complaint in actual, continuous, exclusive or other possession of the lands mentioned in Schedule "A" annexed to the bill of complaint, the defendant has not sufficient information on which to base a belief and therefore denies that during the time mentioned in complainant's amended complaint, or any other time complainant was in the actual or continuous or exclusive or other possession of the lands, or any part thereof, described in Schedule "A" annexed to complainant's amended bill of complaint;

That whether or not the complainant held possession of the lands, or any part thereof, described in Schedule "A" annexed to complainant's amended bill of complaint, under claim of title,
47 exclusive of other rights founding such claim upon written instruments as being a conveyance of the said lands, or held said lands or any part thereof adversely to all the world, defendant has not sufficient information on which to base a belief and therefore denies, that the complainant held, possession of said land, or any part thereof, under claim of title or otherwise, or that complaint founded any claim to said lands, or any part thereof, upon written instruments, or any written instrument or other writing, or that said complainant held said lands or any part thereof, adversely to all, or, to any part of the world;

That whether or not said land described in paragraph 1 of said Schedule "A" as a part of the Mexican Grant known as Orestimba Rancho the defendant has not sufficient information on which to base a belief, and therefore denies that said lands or any part thereof described in paragraph 1 of said Schedule "A" annexed to complainant's amended bill of complaint is a part of a Mexican Grant;

That whether the title of the lands or any part thereof described in Schedule "A" annexed to complainant's amended bill of complaint was derived from the Mexican Government the defendant has not sufficient information on which to base a belief, and therefore denies that the title to said lands, or any part thereof, described in Schedule "A" annexed to complainant's amended complaint is derived from the Mexican Government. That whether or not the lands, or any part thereof described in Schedule "A" annexed to complainant's amended complaint are situate along, or bordering along the San Joaquin River, the defendant has not sufficient information on which to base a belief, and therefore denies that said lands, or any part thereof described in Schedule "A" an-
48 nexed to complainant's amended bill of complaint herein was situate along or bordering on the said San Joaquin River;

That whether or not said lands, or any part thereof, described in Schedule "A" annexed to complainant's amended bill of complaint herein are situate along, or bordering along Salt Slough the complainant has not sufficient information on which to base a belief and therefore denies that said lands, or any part thereof, described

in said Schedule "A" are situate along, or bordering on Salt Slough;

That whether or not the said lands, or any part thereof, described in Schedule "A" are situated along, or bordering on numerous or any natural channels or channel or water-courses or water-course, described in complainant's amended bill of complaint defendant has not sufficient information on which to base a belief, and therefore denies that said lands or any part thereof described in said Schedule "A" are situate on — bordering along numerous or any natural channels, or channel, or water-courses, or water-course, branches or said river or said Salt Slough.

That for thirty years prior to the 15th day of March, 1887, Charles Lux and Henry Miller were a copartnership doing business under the firm name and style of Miller & Lux, that on said *15th* day of *March, 1887*, said Chas. Lux died, that thereafter Henry Miller was in possession of all the property including the lands of said copartnership as the surviving partner of said firm, until the said property was conveyed to Miller & Lux, a corporation, in the year 1897. That Miller & Lux, a corporation, was organized in the year 1897 under the laws of the State of California for the purpose of liquidating the copartnership of Miller & Lux, and distributing the assets of the copartnership Miller & Lux, to the persons
49 who were interested in said copartnership property.

4. Defendant admits that the San Joaquin River is a natural stream or water-course rising in the Sierra Nevada mountains and debouching from the mountains into the plains of the San Joaquin Valley, that whether or not said San Joaquin River flows through said Salt Slough and said numerous other sloughs and natural water courses alleged in complainant's amended bill of complaint the defendant has not sufficient information upon which to base a belief, and therefore denies that the said San Joaquin River flows naturally, or otherwise, to or through said Salt Slough or said numerous or any other slough or sloughs or water-courses, or water-course;

That whether or not the San Joaquin River flows naturally to or through the lands, or any part thereof described in said Schedule "A" annexed to complainant's amended bill of complaint the defendant has not sufficient information on which to base a belief, and therefore denies that the San Joaquin River flows to, or through the lands or any part thereof, described in said Schedule "A."

5. That whether or not the waters of said San Joaquin River naturally flow, or from time immemorial have flowed or do naturally flow along or by or through or over or upon the lands or any part thereof described in said Schedule "A" annexed to complainant's amended bill of complaint herein, the defendant has not sufficient information on which to base a belief, and therefore denies that the waters in San Joaquin River naturally flow, or that the same has at any time naturally flowed, or that the same do naturally flow along or by or through or over, or upon said lands, or any part thereof, described in said Schedule "A";

50 Denies that the waters of the San Joaquin River in their natural flow irrigate any part of the lands described in said

Schedule "A" annexed to complainant's amended bill of complaint, or that said waters, in their natural flow, make the lands or any part thereof described in Schedule "A" annexed to complainant's amended bill of complaint, fit for cultivation, or pasture or that they supply water on said lands, or that water is, from said natural flow, supplied on said land, or any part thereof, for stock, or for agricultural purposes, or that said water in its natural flow supplies water for any purpose for which an owner of land bordering on a running stream has the right to use the water thereof, and

Defendant denies that the said water in its natural flow in the San Joaquin River ever at any time did irrigate, or make fit for cultivation, or pasture the lands, or any part thereof described in Schedule "A" annexed to complainant's amended bill of complaint herein, or did supply water for stock, or for agricultural purposes, or for any other purpose on the land, or any part thereof, described in Schedule "A" attached to complainant's amended bill of complaint;

Denies that the waters of the San Joaquin River in their natural flow would now if the same were not diverted, appropriated and consumed by defendant as alleged in complainant's amended bill of complaint, irrigate, or make fit for cultivation, or pasture, any of the lands described in Schedule "A" annexed to complainant's amended bill of complaint, or that they would supply water for stock, or for agricultural purposes, or for any other purpose on said lands, or any part thereof, described in said Schedule "A".

6. That whether or not the natural flow of the waters of the San Joaquin River, wet or naturally irrigate during the win-
51 ter and spring the lands, or any part thereof, described in Schedule "A" annexed to complainant's amended bill of complaint, defendant has not sufficient information on which to base a belief, and therefore denies that the natural flow of the waters of the San Joaquin River wet or irrigate during the winter and spring, or at any other time, the lands, or any part thereof, described in said Schedule "A" annexed to complainant's amended bill of complaint;

That whether or not the natural flow of waters in the San Joaquin River wet or naturally irrigate during the winter and spring so that it has been possible without artificial irrigation to cultivate portions of said lands described in said Schedule "A" and raise crops and pasture on them the defendant has not sufficient information on which to base a belief and therefore denies that it has at any time been possible without artificial irrigation to cultivate any portion of said lands described in Schedule "A" or to raise crops, or pasture on said lands or any part of them.

That as to whether or not the fact that the natural flow of the waters of the San Joaquin River wet and irrigate the lands described in Schedule "A" constituted the principal inducement of plaintiff and its grantors to purchase the said land, defendant has not sufficient information on which to base a belief, and therefore denies that the fact that the natural flow of the San Joaquin River wet and naturally irrigated the lands, or any part thereof, described in Schedule "A" annexed to complainant's amended bill of complaint consti-

tuting the principal or any inducement to complainant or to complainant's grantors to purchase the said lands, or any part thereof.

That whether or not the complainant, or its grantors, paid large or any sums of money for the land, or any part thereof, described in said schedule "A" annexed to complainant's amended bill of complaint on the faith, or believing that the said lands, or any part thereof could have the benefit of natural irrigation or overflow from waters of the San Joaquin River, or would have any other use of such waters defendant has not sufficient information on which to base a belief, and therefore denies that the complainant, or its grantors paid large or any sums of money for the lands, or any part thereof described in Schedule "A" or that it purchased the same or that said complainant, or its grantors were in any way influenced to purchase said land, or any part thereof, by the belief that the same would have the benefit of natural irrigation or overflow of the waters of the San Joaquin River, or any other use of said water;

That whether or not the complainant, or its grantors, after purchasing the said lands described in Schedule "A", or any part thereof expended large sums of money in improving the same, the defendant has not sufficient information on which to base a belief and therefore denies that the complainant, or its grantors, expended large or any sums of money at any time in improving the said lands, or any part thereof; and defendant denies that the complainant constructed canals, or a canal of any kind, or other works, for controlling or regulating or utilizing the water naturally supplied to said land, or any part thereof, from the San Joaquin River or any branch or channel thereof;

Denies that the complainant or its grantors or any grantor of complainant have, under any claim whatever, for any period of time whatever, constructed or used numerous channels, or any channel or ditches, or a ditch to take water from said river, or any channel, or branch thereof to irrigate the land, or any part thereof, described in Schedule "A" or to supply water for stock or for domestic or other purposes, or purposes in connection with the said lands, or any part thereof, and the occupants or any occupant thereof;

Defendant denies that the complainant during any period of time diverted, appropriated or used through canals, or a channel constructed by complainant any water from said San Joaquin River, or from said Salt Slough, or from any other branch or channel of said San Joaquin River to irrigate the land, or any part hereof described in said Schedule "A", or that any waters diverted, or appropriated from said San Joaquin River by the complainant, or its grantors or any grantor of complainant was used to supply water for stock or domestic or other purposes in connection with said land, or any part thereof, described in said Schedule "A", or in connection with the occupants, or any occupant of said land.

7. Defendant denies that the said lands, or any part thereof described in Schedule "A" are unfit for cultivation or pasture unless irrigated by water other than the natural rainfall.

Defendant admits that there is no natural irrigation of said lands,

or any part thereof, and admits that there is no source from which water could be obtained for the irrigation of the greater portions of said lands described in said Schedule "A" other than from the San Joaquin River.

8. Defendant admits that during the spring and summer months of every year there is a large increase in the volume of water flowing down said San Joaquin River, caused by the melting of the snow in the Sierra Nevada mountains;

That whether or not the increased flow of water coming down said river at any time has caused any portion of the land
54 described in Schedule "A" to become, or to be overflowed, defendant has not sufficient information on which to base a belief, and therefore, denies that the increased flow of water in said San Joaquin River at any time caused any part of the land described in Schedule "A" to become or to be overflowed;

That whether or not the water of the San Joaquin River at any time brought down material which has fertilized, or enriched the land, or any part thereof, described in Schedule "A" the defendant has not sufficient information on which to base a belief, and therefore denies that the waters of the San Joaquin River at any time brough- down material which has fertilized or enriched any part of the lands described in Schedule "A" annexed to complainant's amended bill of complaint;

That whether or not at any time increased crops, or any crops, or grass, or food, or cereals, or other crops has grown on said land because of material brough- into any part of said land by the water of the San Joaquin River, the defendant has not sufficient information on which to base a belief, and therefore denies that at any time crops, or any crop of grasses or grass, or food, or cereals, or other crops, or crop, have been caused to grow on any part of said land, because of any material brought onto said land by the flow of the waters of said San Joaquin River, and defendant denies that the value of said lands, or any part thereof, has increased, because of any material brought onto said lands by the waters of said river.

Denies that any natural overflowing of the lands described in Schedule "A" has wet or irrigated the said land, or any part thereof, so that the same could be, or has been at any time cultivated, or crops, or any crop, raised thereon without other irrigation;

Denies that any of said lands described in Schedule "A"
55 have been cultivated, or crops, or a crop, raised thereon which could not have been so cultivated and the same crops raised thereon without any overflow of said lands or any part thereof by the waters in the San Joaquin River.

That whether or not the alleged increased volume of water in the said San Joaquin River, if diverted so that the same is not permitted to flow down said river channel, the complainant would be deprived of or loose any pasture or feed or crops, the defendant has not sufficient information on which to base a belief, and therefore denies that the complainant would be deprived of or loose pasture or feed, or crops, on said lands, or any part thereof, described in Schedule "A", if the increased volume of water alleged in complainant's bill

of complaint be diverted from said river by defendant, or if such water be not permitted to flow down the channel of said San Joaquin River;

That whether or not the complainant will be deprived of or lose any pasture or feed or crops which would result from any fertilizing or enriching of said lands, or any part thereof described in Schedule "A" by material brough- down to, or deposited upon said lands by the waters of said San Joaquin River, at any time, the defendant has not sufficient information on which to base a belief, and therefore denies that the complainant will be depriv- of or lose any pasture, or feed, or crops, or a crop, which would result from the fertilizing or enriching of said lands or any part thereof described in Schedule "A" by reason of material which would be brought to or deposited upon said lands, at any time by the waters of the San Joaquin River, if the said waters were not diverted by the defendant herein and not prevented from flowing down the channel of said river;

56 Defendant denies that the lands or any part thereof described in Schedule "A" will depreciate in value or deteriorate in quality or that they will produce at any time crops or less quantity or of less value if the water of the San Joaquin River is diverted by defendant, so that the same shall be prevented from flowing down the channel of said river.

9. Denies that the taking of water from the San Joaquin River during the period of increased flow as alleged in complainant's amended bill of complaint in the quantity which has heretofore been taken by defendant will produce great or irreparable, or any injury to the complainant.

Denies that it is, or that it will be impossible to estimate the loss or injury to complainant which will result from any reduction or loss of pasture or feed or crops, or by reason of said lands, or any part thereof, described in Schedule "A" failing to be at any time enriched or fertilized by any overflow of the waters of the San Joaquin River as alleged in complainant's bill of complaint, or by reason of said land or any part thereof not being at any time irrigated or wet by any overflow as alleged in complainant's amended bill of complaint.

10. Admits that the defendant, as hereinafter expressly alleged has dug away and removed a part of the bank of the San Joaquin River at a point in or near section seventeen (17) in township nine (9) south range twelve (12) east Mount Diablo Base and Meridian above the said lands described in said Schedule "A" and has constructed a canal, or ditch, running water from said river at that place, and that defendant did, as hereinafter alleged and stated, by means of dams, levees, sticks, earth and other obstructions placed in the bed and channel of said San Joaquin River obstruct the flow of said river above the lands described in said complainant's amended bill of complaint;

57 Admits that the defendant, as hereinafter expressly stated, diverted by means of said dam and other obstructions in the said canal 500 cubic feet per second of the water flowing in the

said San Joaquin River when that quantity of water was flowing in said river at said place of diversion, and whenever less than that quantity of water was flowing in the said river, than the defendant diverted, as hereinafter stated, all of the water flowing in said San Joaquin River, and the defendant, as hereinafter stated, caused the said water so diverted by it to run down the aforesaid canal so constructed by the defendant and the same was consumed for beneficial purposes and defendant has prevented such water so diverted from flowing to, by, through, over or upon complainant's said lands, and defendant has ever since it commenced diverting said water as hereinafter stated, claimed the right to so divert and appropriate and consume such water, and has ever since continued to do so and is doing so still, and the defendant claims and asserts that in so doing, it is and at all time has been acting within its right and not wrongfully;

Defendant denies that the water so diverted by it, as herein admitted, alleged and stated, was water which the complainant was entitled to have flow down, to, through, or by said land, or any part thereof, described in said schedule "A", in any manner, place or form;

Defendant alleges that the truth of the facts regarding the construction of the canal and the dam alleged in complainant's amended bill of complaint, and the maintenance and repair of said dam, and the diversion of water from said San Joaquin River as alleged in complainant's amended bill of complaint, and the use of the said water as diverted from said San Joaquin River to be as follows: that at the time of the filing of the original bill of
58 complaint herein, the defendant was and ever since has been and now is, and ever since the year 1887 has been the owner of, and at all the said times has had the right to divert and use of the water naturally flowing in the San Joaquin River 500 cubic feet per second, when 500 cubic feet of water per second is naturally flowing, or may hereafter be naturally flowing in the San Joaquin River at the place of diversion alleged in complainant's amended bill of complaint, and when less than 500 cubic feet of water per second is naturally flowing, or may hereafter naturally flow in the said San Joaquin River at said place of diversion alleged in complainant's amended bill of complaint herein, then the defendant is, and at all times since the year 1887 has been, the owner of and has had the right to divert and use all the said water so naturally flowing at said place of diversion alleged in said amended bill of complaint; that the defendant in the year 1887, and at all times since honestly and in good faith claimed to own, and honestly and in good faith claimed the right, and honestly and in good faith believed it had the right, as such owner to divert and use for irrigation, sale, rental and distribution 500 cubic feet of water per second of the water flowing in the San Joaquin River by the place of diversion by the defendant, alleged in complainant's amended bill of complaint herein, when that quantity of water was naturally flowing in said river by said place, and when less than that quantity of water was flowing in said river by said place, then defendant

honestly and in good faith claimed the right, and honestly and in good faith believed it had the right, as such owner, to divert all the water so naturally flowing;

That all persons interested in Miller & Lux, a copartnership or the property thereof, and Miller & Lux, a corporation, the gran-
59 tors and predecessors in title of complainant in and to all the lands, now or at any time owned by said Miller & Lux, Incorporated, and the complainant herein at all times knew all the facts herein alleged and knew of the said claim of defendant to said quantity of water, and of the said claim of defendant to the right to divert the said quantity of water and said predecessors of said complainant consented to and acquiesced in the said claim of ownership by defendant, and said claim of right by defendant to divert said water by said defendant, and said predecessors of complainant at all times knew what such predecessors right and title to said water of said San Joaquin River were; that in the year 1887 the defendant commenced the construction of a ditch and canal with sufficient capacity to convey and carry 500 cubic feet of water per second, with the purpose of extending the same to the San Joaquin River, and diverting there from 500 cubic feet of water per second when that quantity of water was flowing in said river at defendant's place of diversion alleged in complainant's amended bill of complaint, and when less water than 500 cubic feet per second was so flowing, then all the water that was so flowing; that the then owners of all the property, now owned by the complainant herein had knowledge and knew of said ditch and canal and of what had been done by the defendant and of the said intention of the said defendant, and of the said claim of the defendant to the waters of said San Joaquin River, that the predecessors of complainant owned certain lands, other than the lands described in Schedule "A" annexed to complainant's amended bill of complaint, which said other lands are now all owned by the complainant and over and through said other lands, defendant in the year 1887 proposed and intended to dig and construct said ditch and canal to said
60 San Joaquin River, and over which said land and through which said canal, after the said canal should be built and constructed, the said defendant proposed and intended to flow the said water so by it to be diverted, and the then owner of said lands then knew and had full knowledge of all said purposes and intentions of said defendant; that the complainant is the grantee and successor in title to all the lands heretofore owned by Miller & Lux, a copartnership, and by Miller & Lux, a corporation; that in the month of August, 1887, before the completion of said canal by the defendant herein, and a short time after defendant had commenced to build and construct said canal, the defendant and the predecessors in interest and title of complainant, to all the property now, or at any time owned by the complainant who was at said time the owner, and which said predecessor then well knew its own rights in and to the waters of the said San Joaquin River, and who then well knew of defendant's claim of right thereto, made an agreement wherein and whereby the said predecessor in interest and in title of the com-

plainant herein to the land and property now owned by complainant agreed with the defendant, among other things, to convey to the defendant a right of way, and right to enter upon certain of the said lands of said predecessor of said complainant, and thereon to construct said above described canal, so intended by the said defendant to be constructed, and it was provided in said agreement for said right of way, that the right of way agreed to be conveyed should be held, and be enjoyed by the defendant, and its successors and assigns, so long as the canal so to be built was used for carrying water therein for the purposes of said defendant, and it was further provided in said agreement that if the said defendant should cease to operate said canal for a period of two years consecutively said right
61 of way should cease and be at an end, and the said defendant, in and by said agreement, in consideration of the said right of way so to be granted by the predecessor of complainant, covenanted and agreed with said predecessor of complainant that whenever the said canal so to be constructed should be used for carrying water, that the said predecessor of complainant should have the right to have and receive there from, and that there should be delivered and turned out of said canal to said predecessor of complainant and to the grantees, heirs and assigns of said predecessor of complainant, at places along the line of said *of said* canal where the said canal should run through the lands owned by the said predecessor of complainant, fifty (50) cubic feet of water per second of the natural flow of said canal, as long as there was not less than two hundred (200) cubic feet of water per second flowing in the said canal above the place from which the said fifty (50) cubic feet of water per second was taken, and when there was less than two hundred (200) cubic feet of water per second flowing in said canal, so to be constructed, the said predecessor of complainant and the grantees, heirs and assigns of said predecessor of complainant, were to receive and should receive one-fifth (1/5) of all the water flowing in said canal, until the amount was reduced to one hundred (100) cubic feet of water per second, and after the water flowing in said canal was reduced to one-hundred (100) cubic feet of water per second the said predecessor in interest of complainant was to be entitled to no water, except that all of the cattle and live stock of said predecessor of complainant were to be permitted to enter upon said right of way and canal and drink the water flowing in said canal, and for domestic purposes, and by said contract it was
62 further provided that the said defendant should at such places as were designated by said predecessor of complainant, upon thirty days previous notice, construct and thereafter maintain suitable gates and stop-gates in the canal, so that there might be delivered and measured the water to which said predecessor of complainant was entitled, and it was further agreed therein that the then predecessor of complainant, after the said canal then contemplated to be built should be constructed, should execute and deliver to the said defendant a deed of conveyance granting the said right of way to the said defendant, and that the said defendant should then execute and deliver and covenant to execute and deliver to the

said predecessor of complainant an agreement covenanting to supply and deliver the water as by said agreement provided, and containing all the conditions of said agreement so to be kept and performed by said defendant, and it was further provided in said agreement that the right of way so agreed to be conveyed by said predecessor of complainant, and the water so to be furnished and delivered by said defendant were conditions of said contract, depending one upon the other; that at the time of making said agreement, and at all times since, there were numerous persons other than the parties to said agreement who were the owners of riparian lands along the banks of said San Joaquin River both above and below the said place where the defendant intended to divert said water from said river; that the defendant so claiming to own said water and so claiming the right to divert the same did in the year 1887, after the making of said agreement with the said predecessor of complainant with the knowledge and acquiescence of said grantors and predecessors in interest of complainant, construct a canal with sufficient capacity

63 to divert and carry, and for the purpose and with the intention of diverting and carrying, of the waters of the San Joaquin River flowing by the defendant's place of diversion alleged in complainant's amended bill of complaint herein five-hundred (500) cubic feet of water per second when so much water was flowing in the said San Joaquin River at said place of diversion, and with the intention of diverting when less than 500 cubic feet of water per second was flowing in said San Joaquin River at said place, all the water which was so flowing in said river for irrigation, sale, rental and distribution; and said defendant continued the building and construction of said canal of said capacity and for said purpose, and with the said intention to its completion in the year 1888, for the distance of more than twenty (20) miles and at an outlay and expense exceeding $100,000. That the said grantors and predecessors in interest of complainant at all times had knowledge of the building of said canal, and of the intention of said defendant to divert water therein from said San Joaquin River, as aforesaid, and of the expenditure of said sum of money in the construction of said canal, and of the said claim of ownership of said water by said defendant, and of the claim of right to divert said water by defendant and they acquiesced therein; that in building the said canal and expending the money in the construction thereof, the defendant did so, relying on the honest belief that it had the right to divert into its canal, when constructed, the said above mentioned quantity of water and relied upon the acquiescence of said grantors and predecessors in interest of complainant in the said claim of ownership of said water, and said right claimed by the said defendant to divert water, as aforesaid;

64 That said grantors and predecessors in interest of complainant at all times well knew that the said defendant was building and constructing said canal, and expending said money in the honest belief that it would have the right when said canal was completed, to divert therein the said quantity of water, and well knew that the said defendant was building the said canal and ex-

pending the said money, in reliance upon said acquiescence of said grantors and predecessors in interest of complainant in said claim of defendant to the ownership of said water and the right to divert the same, as aforesaid; that immediately upon the completion of the construction of said canal, the said defendant commenced the said diversion of the waters of the said San Joaquin River, so claimed as aforesaid, and has continued to divert the same, from and including the year 1888, to the present time, and the waters so diverted have been used for the irrigation of the land along the line, and below the level of the water in said canal, and for watering live stock, and for domestic purposes, and all of said water so diverted has been used for beneficial purposes; that at the same time that this defendant dug and constructed said canal, the said defendant built a dam, across the channel of said river immediately below the place where the said canal was cut through the bank of said river, which said dam has been, at all times, necessary to divert water into said canal from said river whenever the flow of water in said river was at a comparatively low stage, and which said dam has, at all times, been used to divert water into said canal from said river when five-hundred (500) cubic feet of water per second would not run into said canal without said dam, and it is the intention of the defendant to so use said dam in the future; Said dam is the dam mentioned and described in complainant's amended bill of complaint filed herein; said dam is now, and, ever since the year 1888, has
65 been built of brush, lumber, sand and dirt and has been annually repaired and parts thereof which were washed away by the high water which annually flows in said river each year, have each year, after the said high water in said river subsided, been restored and the said defendant has continuously, since the year 1888, maintained said defendant's dam and has repaired, renewed and restored the same from year to year, during the said time, openly, notoriously, peaceably, adversely, exclusively and uninterruptedly and under claim of right both as against the complainant herein and the whole world, and with the knowledge and acquiescence of the complainant and its predecessors and grantors; and the defendant continuously, since the year 1888, took and appropriated the waters of said San Joaquin River at the said defendant's place of diversion alleged in complainant's amended bill of complaint herein, as hereinbefore stated, to the extent of five hundred (500) cubic feet of water per second, when that quantity of water was flowing in said San Joaquin River, at said place, and, when less than that quantity of water was flowing in said San Joaquin River, at said place, then all the water at any such time flowing in said San Joaquin River at said place, openly, notoriously, peaceably, adversely, exclusively and uninterrup-edly and under claim of right both as against the complainant herein and the whole world, and with the knowledge and acquiescence of the complainant and its grantors and predecessors in interest, and said defendant took and appropriated said water to furnish the same, and for the purpose and with the intention of furnishing and supplying the same, for

beneficial purposes to the inhabitants of the lands situated along the line of and below the level of the water in said canal, for the irrigation of the said lands so situated, and for sale, rental and
66 distribution by said defendant, to all persons needing and desiring to use the same, and for use chiefly for the purpose of irrigation; and pursuant to such intention, the said defendant immediately after appropriating and diverting said water as aforesaid, commenced to furnish the same for sale, rental and distribution, and all thereof was so furnished and used for the purpose of irrigation, domestic uses, and stock purposes, upon said lands lying along the line of said canal and below the level of the water therein, to all persons owning, occupying and using lands in said territory and within the flow of said defendant's canals, who desired to receive and use the same, and said water and all thereof was used for the irrigation of said lands in growing trees, vines, alfalfa and in producing crops of grain, alfalfa, grapes, fruits and wild grasses on said lands, and said trees, vines, and alfalfa are now studying and growing upon a large part of said lands so irrigated, and said lands, on which said water is being and has been used as aforesaid, are naturally dry and unproductive, and without said water all such trees, vines, and other crops and said grasses thereon would wither and die and become wholly destroyed, and there is no other water sufficient and available, or which could be appropriated, for the irrigation thereof; and said lands, so irrigated by said water, upon which crops have been made to grow, constitute and comprise an area of more than thirty thousand (30,000) acres of land; and the said grantors and predecessors in interest of complainant in the lands described in complainant's amended bill of complaint, and the complainant at all times have well known that said waters, so diverted by defendant, were being appropriated and used by such persons taking and using the same for the purposes aforesaid and under a claim of right, openly, notoriously, continuously, adversely,
67 peaceably and uninterruptedly during all the times herein mentioned; and neither the said grantors and predecessors in interest of complainant, nor the complainant, have ever in any manner, at any time prior to the commencement of this action, protested, advised, suggested or intimated to the defendant herein or to said or any of the users of said water that they disputed, or intended at any time to deny or dispute, the right of said defendant or of said users of said water to appropriate and use the same, as aforesaid; and neither the said grantors or predecessors in interest of complainant in and to the lands described in complainant's complaint, nor the complainant, in any manner or way gave notice to said defendant herein, or to said users of said water, or any thereof, at any time prior to the commencement of this action, that they, or either of them would require the said defendant to desist from diverting the said water from the said San Joaquin River; or that they, or either of them, would ever claim or assert in any way that said water was not being taken by said defendant under a claim of right, with good and valid title thereto;

That after the construction of said canal and said dam, and the diversion of water therein, and the use and distribution of the water diverted in said canal, as aforesaid, and at the time said diversion, distribution and use were being made and had, the said grantor and predecessor of complainant, who had made the said agreement with defendant, made and executed to defendant, on the 8th day of December, 1893, a deed of the right of way whereon the said canal had been constructed, in which said deed reference was made to said agreement, and to the fact that the said canal had been constructed, and to the fact that said canal was then carrying water for irrigation and other purposes, and by said deed the right was granted to defendant to enter upon the said right of way to the extent
68 that such entry was necessary to maintain and repair and keep in good condition the said canal, and it was in said deed conditioned that the said right of way therein granted should be held and enjoyed by the defendant, its successors and assigns, so long as the canal is used for carrying water therein for the purposes of the defendant; and in consideration of said deed of said right of way and right to enter, the said defendant, in and by the terms of said deed, granted and conveyed to said predecessors of the complainant, their heirs and assigns, fifty (50) cubic feet of water per second of the water which should be at any time flowing in said canal, so long as there was not less than two hundred (200) cubic feet of water per second so flowing, and one-fifth (1/5) of the quantity at any time flowing in said canal, when there was less than two hundred (200) cubic feet of water per second and more than one hundred (100) cubic feet of water per second flowing in said canal; and stock water and water for domestic purposes when less than one hundred (100) cubic feet of water per second were flowing in said canal; and it was provided in said deed that the right of way therein granted and the delivery of the water to the said predecessors of the complainant, their heirs and assigns, were conditions dependent one upon the other, and that the right of way, with the right to enter, and said right to said water shall run with the land; and it was further provided in said deed that the water to which the said predecessors of the complainant were entitled, under the provision of said deed, should be used upon the lands then owned by the said predecessors and upon land afterwards to be acquired by said predecessors;

That the said deed was drawn by the attorney for, and at the instance and request of the said predecessors of complainant,
69 and at the time of said execution of said deed by the said parties, it was well known to the said predecessors of complainant that the defendant believed that said deed would be construed, and did provide for and as recognizing and admitting the ownership of said defendant to said quantity of five hundred (500) cubic feet of water per second of the flow of water in the San Joaquin River, and the right to divert the same from the said San Joaquin River; and said contract and deed with defendant were based upon such fact as an admitted fact;

That the value of said canal would be destroyed and said canal rendered useless, if the complainant is permitted to assert or prove title to said waters, or is granted any relief herein which prevents the defendant from diverting said water, so by it heretofore diverted from the said San Joaquin River;

That from the time of diversions of said water, as aforesaid, many of the owners of land, and persons occupying lands, along the line of said canal and within the flow of said canal, honestly believing that said defendant had good title to said water and good right to appropriate the same, and relying upon the aforesaid acts and conduct of the said grantors and predecessors in interest of complainant, proceeded to purchase, rent, take and use said water upon the said lands along the line of said canal and under its flow, and upon the faith of the continuance of the use of said water, and in the belief that the said right and use would be continuous, and relying upon the acquiescence, conduct and acts of the complainant and the grantors and predecessors in interest of complainant, as aforesaid, did proceed to plant said land in trees, vines, alfalfa and other crops requiring irrigation, and at very great expense, so that many
70 thousands of dollars had been expended at the time of commencement of this suit, by persons taking and using water from said defendant upon the said lands along the line of defendant's canal and under its flow, all of which will be lost and destroyed if the complainant shall prevail in the action herein commenced and shall obtain a judgment that this defendant has no right to divert water from said river;

That the said investments were made and said property improved, and said vines, orchards and alfalfa were planted and irrigated, and money necessary therefor expended in good faith in reliance upon the conduct aforesaid of the complainant and of the said grantors and predecessors in interest of complainant aforesaid, and upon the honest belief on the part of the persons purchasing, renting and using said water that they and the defendant herein had good right to use the same, and in reliance upon the aforesaid conduct of complainant and of its grantors and predecessors in interest aforesaid, and by reliance upon the part of said persons, and each *fo* them, as well as this defendant, that the complainant herein would never claim or assert any right contrary to the said claim to the said water made by said defendant;

That the defendant, after the diversion of said water, made and entered into contracts for the sale and furnishing of water on the faith of said acts and conduct of the complain-t and its grantoss and predecessors in interest, as aforesaid, and in the belief that no title or right of the complainant would be asserted to prevent said diversion of said water, which said contracts could not be performed by defendant if a judgment of this Court was pronounced, enjoining the defendant from diverting said water, and the said defendant would be thereby involved in litigation and made liable to damages in large sums of money;

71 That all of the acts and omissions of the grantors and predecessors in interest of complainant herein alleged were at all times well known to complainant.

That the renters and users of said water will suffer great loss and damages if the defendant is prevented from diverting all of said quantity of water heretofore diverted by defendant.

That all of the lands, situate below the flow of water in said defendant's canal, and which can be irrigated therefrom, are adapted to irrigation, and by irrigation larger and more profitable crops can be grown upon said lands than can be grown without irrigation, and said lands constitute a farming neighborhood.

That said water was appropriated for use, and all thereof has at all times been continuously, and is now, used for beneficial purposes, to-wit, for the irrigation of lands, the watering of live stock and for domestic purposes;

That each and all of the matters and things including the appropriation of said water by defendant and in the manner aforesaid, the construction and completion of said system of canals for the diversion and distribution of said water, the diverting and taking of said water from said river and the use thereof by said persons upon said lands lying along the line of said canal and under the flow thereof, for the irrigation of said lands; and the planting and growing of said orchards, vineyarss, alfalfa and other grasses upon said lands have been continuous for five years prior to the commencement of this action;

That ever since the completion of said canal by defendant, the grantors and predecessors in interest of complainant, and the complainant, since its organization, have claimed the right, under
72 and by virtue of and through said contract made with the defendant, and said deed made with the defendant, to have furnished to it and them by defendant, and during said time there has been furnished and delivered to it and them by defendant, from said defendant's canal, of the water diverted into said canal from said river, fifty (50) cubic feet of water per second, when there was flowing in said canal two hundred (200) or more cubic feet of water per second, and when there was less than two hundred (200) cubic feet of water per second and not less than one hundred (100) cubic feet of water per second flowing in defendant's said canal, then the complainant and its predecessors in interest, as aforesaid, have claimed the right to have delivered and furnished to them by defendant one-fifth (1/5) thereof, and when there was less than one hundred (100) cubic feet of water per second flowing in said canal, the complainant and its predecessors in interest, as aforesaid, have claimed the right to have delivered and furnished to them from the waters flowing in said canal, sufficient thereof for the watering of all live stock and for domestic purposes;

That after the making of said agreement between said defendant and said predecessors of complainant, as aforesaid, in August, 1887, and after the making of said deed, the said defendant at all times furnished and delivered, as therein agreed to said complainant and said predecessors of complainant, and said complainant and said predecessors of complainant received and used the said quantity of water in said contract and deed agreed to be delivered and furnished to said complainant and its said predecessors in interest.

11. Denies that all or any of the waters so heretofore diverted by defendant from said San Joaquin River, as herein stated, are waters which the complainant had the right, or any right to have
73 flow in said river, or in said Salt Slough, or in any other branch or channel of said San Joaquin river or elsewhere to, through, along, by or over said lands described in Schedule "A" annexed to complainant's amended bill of complaint, and denies that said complainant had any right to use or to the use of said water.

12. Denies that all the lands which have heretofore been irrigated by the water diverted by defendant has not been naturally irrigated by the waters of said San Joaquin River, and denies that all the land which has heretofore been irrigated by the water diverted from the said San Joaquin River, by defendant has not been ripparian to said river, and in this behalf, defendant alleges that a large portion of the land, heretofore irrigated by said water diverted from said San Joaquin River, by defendant, herein stated, was land which was naturally irrigated by the waters of said San Joaquin River, and was riparian to said river, and a large portion of said riparian lands, so irrigated by said water diverted by defendant, was situated upon said river above the lands described in Schedule "A" annexed to complainant's amended bill of complaint.

And said water was so used for the irrigation of said riparian lands by the owners of said riparian lands and was furnished by the defendant to said owners at the request of said riparian owners.

13. Denies that the said diversion of water by said defendant, as hereinbefore stated, will cause great and irreparable, or great or irreparable or any damage to complainant, or that by reason thereof, the lands described in said Schedule "A," or any part thereof, will not be supplied with water for their irrigation, or that any crops sowed or planted upon said lands, or any part thereof, will dry up or
74 be destroyed, or be rendered valueless, or that the cattle pastured on said lands, or any part thereof, described in Schedule "A" annexed to complainant's amended bill of complaint herein, will be deprived of water sufficient for their needs, or that large or any numbers of them will dry or will be destroyed, or that the pasture on said lands, or any part thereof, will be damaged, or that the value of said land will be depreciated, or that the complainant will not receive the amount of water which it is entitled to receive with which to irrigate said land, or for any other purpose;

Denies that it will be impossible to estimate the value of any crops, or pasture, which would be lost by reason of the said diversion of said water by said defendants, as herein alleged; denies that any crops, or pasturage, or any part thereof, will be dried up, killed or destroyed by the diversion of said water by defendant, and, denies that the damage therefrom, if any, is not susceptible of accurate measurement; Denies that it will be impossible to estimate the amount, or extent of the depreciation of the value of the lands described in said Schedule "A," and, denies that complainant cannot obtain adequate relief in an action at law.

14. Admits that said defendant continues, and threatens to continue the maintenance of said dam and other obstructions in said

river as aforesaid, but alleges in that behalf that the defendant is acting within its rights in so doing, but denies that the continuance and maintenance of said dam and other obstructions in said river will be to the great or inestimable, or irreparable, or any damage of complainant;

Admits that defendant claims and asserts the right to divert certain quantities of the waters of said river through the canal above mentioned; defendant admits that it claims and asserts the
75 right to construct and maintain a dam, or dams, at the head of certain of the natural branches of the main channel of said San Joaquin River, to wit, all of the natural branches of the main channel of said San Joaquin River, which draw water from said main channel of said river above the place of diversion of water by defendant alleged in complainant's amended bill of complaint, and discharge the water so drawn, back into said river, or into said Salt Slough below said place where said defendant's divert water from said river channel, which said natural branches, among others include Deep Slough mentioned in plaintiff's supplemental bill of complaint herein, and also other sloughs known as Poso Slough and Temple Slough, which complainant has described as certain of the natural branches of the main channel of said river, at the times, and under the circumstances and for the purposes hereinafter mentioned and not otherwise;

That whether or not the branches of said river which the defendant claims and asserts the right to construct and maintain a dam around the head thereof, run down to and connect with said Salt Slough, the branches and channels thereof, and carry a portion of the waters of said river down to and through said Salt Slough, and the branches and channels thereof, and thence down to, over and through the said lands of complainant, the defendant has not sufficient information on which to base a belief and therefore, denies that said branches run down to, or connect with said Salt Slough, or with the branches or channels or any branch or channel of said Salt Slough, or that said branches of said river carry any portions of the waters of said river down to, or through said Salt Slough, or to, or through any branche or channel thereof, to or through or over
the said lands, or any part thereof, described in Schedule
76 "A" annexed to the amended bill of complaint herein, but alleges in that particular that each of said branches carries all the water that flows therein from said river at the head of such branch to be and around the place where defendant diverts water from said river as alleged in said amended bill of complaint so that the water which flows in to any of said branches is never discharged back into the said river above the said place where said defendant diverts water from said river; denies that by means of said dams, or any dam, built by the defendant, the defendant will obstruct and prevent the flow of any part of the water of said river into the said branches, except at the times and in the manner and under the circumstances and for the purposes hereinafter stated; defendant admits that all the water which it prevents from flowing down said natural branches of the main channel of the said river will flow

down the main *cha*nnel of said river to the head of defendant's said canal, and will be diverted by defendant into said canal and carried away from said lands described in Schedule "A" annexed to complainant's amended bill of complaint and will be used upon the land, and said water will be used in the manner at the place and for the purposes hereinbefore alleged; and regarding its said claim and asserted rights to construct and maintain a dam, or dams, at the head of those natural branches of the main channel of said river including said Deep Slough alleged in the supplemental complaint herein, and regarding the times, circumstances, purposes when the defendant will obstruct and prevent the flow of any of the water of said river into the branches of said river*m* and regarding the dams which the defendant has heretofore built around the head of Deep Slough as all-ged in the supplemental complaint herein the
77 defendant alleges the truth of the facts to be:

That the quantity of water which has flowed in said river channel every year heretofore has varied at different seasons of the year; that the maximum flow therein each year has approximated 20,000 cubic feet per second, and the minimum flow in ordinary years has approximated 400 cubic feet per second, measured at the place on said river where the said river first enters, at its highest point, upon the lands of the complainant herein, which place of measurement is above the place where the said defendant has at all times, as hereinbefore stated, maintained its dam, and diverted water from said river;

That there is no reason known to defendant why the said past flow of water in said river will not continue to be the future flow of water in said river at the same place;

That said place, where said river channel in its course first enters the land of complainant, is hereinafter designated as the "said place of measurement";

That below said place of measurement, on both sides of the San Joaquin River, the complainant is the owner, and it and its predecessors in interest and title have been the owners, of certain lands which border upon and constitute part of the banks of the said San Joaquin River; and below said place of measurement, on both sides of the said San Joaquin River, there are many miles of land not owned by complainant, but owned by many persons, which said land borders upon and constitutes the banks of said San Joaquin Ri*b*er, and is riparian to said river;

That about two-thirds (2/3) of all of the lands owned by complainant, which so border upon and constitute part of the banks of said river, are situated upon the banks of the said river be-
78 low the place on said river where the said defendant has diverted and now diverts its water, as hereinabove mentioned;

That said Deep Slough, Poso Slough and Temple Slough and other natural branches of the main channel of said river alleged and described in complainant's amended bill of complaint and supplemental bill of complaint herein, each is, and at all times has been a slough which makes across a certain piece of land situated in one of the bends of the said San Joaquin River and of the water which

is, and at all the times has been as herein stated discharged into each of said slough from said river, a large part of said water so discharging into each of said sloughs is, and has been at all times as herein stated returned to said river channel at some place below the place where defendant diverts water from said river as alleged in complainant's amended bill of complaint, and the balance of said water so discharged into said sloughs from said river, distributes itself so that no part thereof is returned to the said river channel above the said place where the said defendant diverts water from said river; that said Deep Slough, Temple Slough and Poso Slough and said other natural branches of the main channel of said river each at its upper end connects, and at all times has connected, with the said San Joaquin River above the said place on said river where the said defendant diverts and where it has, as hereinabove stated, diverted the water from said river channel, and they each continue thence, following generally the course of the said San Joaquin River, until each of said sloughs connects, at its lower end, with the main channel of said San Joaquin River and the place where each of said sloughs and other natural branches of said river connects at
79 its lower end with said river is below the place where the defendant diverts and where it has, as hereinbefore stated, diverted water from said San Joaquin River; that the water which has flowed from said San Joaquin River in the said sloughs and other natural branches of the main channel of said river, at the upper end of each of said sloughs and natural branches of the main channel of said river, has followed the course of said sloughs and has passed, and at all times has passed, in said sloughs and other natural branches of the main channel of said river, around the dam and headgate of the defendant at the place where said defendant diverts, and at all times has diverted, water from the said San Joaquin River, as hereinbefore stated; and said water in each of said sloughs, and in said natural branches of the main channel of said river, is, and at all times has been, discharged back into the channel of said river below the place where defendant is now diverting, and has heretofore diverted, the water from said river channel, as hereinbefore stated; and when water is discharged from said river into the upper end of said sloughs and natural branches of the main channel of said river, such water so discharged cannot be made to flow into the ditch and canal of the defendant, hereinbefore mentioned;

That all of the complainant's lands described in Schedule "A" attached to complainant's amended bill of complaint herein, are below the places where said sloughs, and other natural branches of the main channel of the said river above described, discharge their waters into the said river channel;

That of the water which may at any time be flowing in said river at said place of measurement hereinbefore specified, at least 200 cubic feet per second are necessary, and at all times heretofore have been necessary to supply all the said riparian owners of land
80 along the banks of said San Joaquin River, for use on said riparian lands, below the place of said measurement, with

water sufficient for the requirements of live stock pastured on said riparian lands, and for domestic purposes; and more than 150 cubic feet of water per second thereof was, prior to the time of diversion and appropriation of water by the defendant, as hereinbefore stated, necessary to supply the owners of said riparian lands, for use on riparian land, below said place where the defendant diverts, and at all times has diverted, water from said river, as hereinbefore stated, with water sufficient for live stock pasturing on said riparian lands, so situated below said defendant's place of diversion, and for domestic purposes; thereon;

That of the water in said river flowing at any time at said place of measurement, after deducting therefrom the said 200 cubic feet per second of water necessary for live stock and domestic purposes, as aforesaid, said complainant and its predecessors in interest and title to all the lands now owned by said complainant, prior to the time of the appropriation and diversion of the water by defendant, as hereinbefore stated, were entitled to receive and use their reasonable and just proportion for the irrigation of their riparian lands, which said reasonable and just proportion did not exceed one-tenth (1/10) of said water so at any time flowing at said place of measurement in excess of 200 cubic feet of water per second; and which said one-tenth (1/10) of said quantity of water, so at any time flowing at said place of measurement in excess of 200 cubic feet per second of water, prior to the time of the appropriation and diversion of the water by defendant, as hereinbefore stated, including all the rights of the complainant and its predecessors in interest and
81 title to use water for the irrigation of lands now owned by complainant, bordering upon the said San Joaquin River both below and above the place where the defendant diverts, and at all times heretofore has diverted its water, as hereinbefore stated.

That of the said lands so owned by the complainant and its predecessors in interest and title which are riparian to said San Joaquin River, more than two-thirds (⅔) thereof are situated below the place where the defendant diverts and appropriates, and at all times heretofore has diverted and appropriated water, as hereinbefore stated; that of the quantity of lands bordering on the said San Joaquin River below the said place of measurement the said complainant does not own, nor has it, or its predecessors in interest and title at any time owned to exceed one-tenth (1/10) thereof; that all of the lands below said place of measurement which are riparian to said San Joaquin River are, and at all times have been, equally susceptible and adapted to irrigation from the waters of said San Joaquin River; and the same benefits would be, and at all times would have been, derived from all parts of said riparian lands from the use of the water of said river thereon for irrigation;

That all parts of said riparian lands below said place of measurement would require, and at all times when the same have been irrigated did require, practically, acre for acre, the same quantity of water to be used for the irrigation thereof; and each owner of said riparian land along the banks of said San Joaquin River was prior to the time of diversion of the water by defendant, as hereinbefore

stated, entitled to the use of, and had the right to use for the irrigation of his said riparian land such a part of the water at any
82 time flowing in said San Joaquin River at said point of measurement as the number of acres of such riparian land owned by such owner bore to the whole of the said riparian land bordering on said San Joaquin River below said place of measurement;

That at least nine-tenths (9/10) of said riparian lands, below said place of measurement, are situated on said San Joaquin River below the place where the defendant diverts, and at all times has diverted, water, as hereinbefore stated;

That in the natural state of said river channel and the channel of said Deep Slough, prior to and at the time that defendant first constructed its dam, as hereinbefore stated, to divert water from said river into defendant's canal at the place hereafter specified, when the water flowing in said river channel was one hundred and fifty (150) cubic feet per second or less at the junction of the upper end of said Deep Slough with said river channel, none of the said one hundred and fifty (150) cubic feet of water per second so flowing at said place in said river channel, would enter the said slough, but the whole thereof would pass down the channel of said river by the place where said dam of the defendant was erected, as hereafter stated, and where the defendant diverts the water from said river, as hereinafter stated;

That the relative planes of the bottom of said river channel and of the bottom of said Deep Slough are such that, in their natural condition before the construction of the said dam by defendant at the place where defendant diverts water, as hereinbefore mentioned, the bottom of the river channel immediately above and immediately below and at the place where the upper end of said Deep Slough makes out of said river was more than one hundred (100)
83 feet wide, and the bottom of the channel of said slough did not then exceed twelve (12) feet in width; and the said Deep Slough made out of said river at about a right angle to said river channel; and in the natural condition of said river channel and said Deep Slough, at the time of and prior to the construction of the dame by defendant at the place hereinafter mentioned, where defendant diverts water from said river, whenever the water flowing in said river channel at said place where the slough makes out of said river, was of sufficient quantity to raise the surface of the water above the bottom of the channel of said slough, the water would run into and down said Deep Slough, not to exceed one-tenth (1/10) part of the quantity of water flowing in said river channel above the level of the bottom of said Deep Slough;

That the relative elevations and slopes of the bottom of the channel of the said river and the bottom of the channel of said Deep Slough, and the relative sizes of said river channel and said Deep Slough were such at the places where said Deep Slough makes out of said river that at the time of and prior to the construction of the dam of defendant hereinbefore mentioned, whenever the water flowing in said river channel at said place where the said Deep Slough makes out of said river was sufficient in quantity to raise the surface of the water flowing in said river channel so that the same would flow

into the said Deep Slough, there would flow into the head of said Deep Slough not to exceed one-tenth (1/10) part of the quantity of the water flowing in said river channel above the level of the bottom of said Deep Slough;

That the said riparian lands now owned by the complainant were acquired by the predecessors of complainant and by com-
84 plainant by purchase from persons who owned the same in separate and distinct parcels; and the said riparian lands above the place of diversion by the defendant, as hereinbefore stated; were acquired by the predecessors of complainant by deeds of conveyance from owners and by — deeds of conveyance, and the said riaprain lands below said place of diversion were acquired by the complainant's predecessors from other owners and by other deeds of conveyance;

That the said complainant herein, in order to increase the scouring of the water on the bottom of said Deep Slough and at the head of said Deep Slough, has, within the last five years, and particularly during the years 1904 and 1905, cut away and removed the banks and lowered the bottom of said Deep Slough, and cut away and removed certain brush which had theretofore at all times grown upon the banks of said Deep Slough, and which had theretofore impeded the flow of water in said Deep Slough; and the said cutting away of the banks and lowering of the bottom of said Deep Slough and the cutting out and removing of said brush, did increase the flow of the water in said Deep Slough and the current hereof, so that the bottom of said Deep Slough was lowered and the said Deep Slough widened at the place where said Deep Slough leaves the said river and at the highest place in the bottom of said Deep Slough;

That the water which flows in the San Joaquin River has always carried large quantities of silt, mud, detritus and sand, which has been arrested and caused to settle in the channel of said river by the dam constructed by defendant at the place where water has been, and is being, diverted from said river by defendant, as hereinbefore stated;

That by reason of said settling and arresting of said mud,
85 sand, silt and detritus by said dam, the river channel, from the said dam of the defendant, hereinbefore mentioned, up to a place above said Deep Slough, has become partially filled with silt, detritus, sand and mud, so that the bottom of the channel of said river has been gradually raised more than two (2) feet, and the bottom of said Deep Slough has been washed to a lower relative elevation with the bottom of the original river channel than it was at the time and before said dam was constructed, so that water will run into said Deep Slough from said river channel in greater quantities than would run therein prior to the time said dam was constructed, and will run into said Deep Slough from said river channel at stages of water in said river channel where before the construction of said dam by defendant said water would not run into said Deep Slough;

That by reason of said filling of said river channel with said silt, detritus, sand and mud and the resulting increase in flow of the water in said Deep Slough, there is formed in said river at low stages

thereof, immediately below the junction of said Deep Slough with said river, a bar of sand which obstructs the flow of water down said river, and causes a larger quantity thereof to flow into said Deep Slough;

That at all times when there is flowing in said river less than five hundred (500) cubic feet of water per second immediately above the dam constructed by defendant, as hereinbefore described, the said dam of defendant obstructs the flow of water in said San Joaquin River, and sets the same back into the channel of said river, so that the water in the channel of said river, at the head of said Deep Slough, is caused to stand at a greater depth than would be the case if said water was not so obstructed and set back, and if the
86 head of said Deep Slough is left obstructed, a greater quantity of water is thereby caused to run into the head of said Deep Slough;

That in the natural condition of said Temple Slough the bottom of said Temple Slough at the head of said Temple Slough was over three (3) feet eight (8) inches above the bottom of the San Joaquin River channel immediately opposite to the head of said Temple Slough, so that no water whatever would run into said Temple Slough until there was flowing in said San Joaquin River opposite the head of said Temple Slough more than three (3) feet eight (8) inches in depth of water in said river channel; that said Temple Slough in its natural condition was less than fifteen (15) feet wide at the head of said Temple Slough; that said complainant within the two (2) years last past dug away the banks and bottom of said Temple Slough at the head of said Temple Slough and for a distance of several miles along the course of said Temple Slough, commencing at the head of said Temple Slough, so that the said Temple Slough was made more than fifty (50) feet wide at the head of said Temple Slough and so that the bottom of said Temple Slough was below the level of the bottom of said river channel immediately opposite to the head of said Temple Slough, and so that the grade or fall of said Temple Slough from its head was increased so that when the stage of water was such in the river that water would run in the said Temple Slough more than twice as much water would flow into and through said Temple Slough as would have flowed through said slough in the natural condition or fall of said Temple Slough; and after the water in said river was of a sufficient depth to flow into said Temple Slough not more than one-thirtieth (1/30) of the water flowing in said
87 river above the elevation of the bottom of said slough would flow into said Temple Slough in its natural condition before the changes therein made by complainant as herein alleged.

That in the natural condition of said Poso Slough the bottom of said Poso Slough at the head of said Poso Slough was over three (3) feet eight (8) inches above the bottom of the San Joaquin River channel immediately opposite to the head of said Poso Slough, so that no water whatever would run into said Poso Slough, until there was flowing in said San Joaquin River opposite the head of said Poso Slough more than three (3) feet eight (8) inches in depth of water in said river channel; that said Poso Slough in its natural condition

was less than fifteen (15) feet wide at the head of said Poso Slough; that said complainant within the two (2) years last past dug away the banks and bottom of said Poso Slough, at the head of said Poso Slough, for a distance of several miles along the course of said Poso Slough, commencing at the head of said Poso Slough, so that the said Poso Slough was made more than fifty (50) feet wide at the head of said Poso Slough and so that the bottom of said Poso Slough was below the level of the bottom of said river channel immediately opposite to the head of said Poso Slough, and so that the grade or fall of said Poso Slough from its head was increased so that when the stage of water was such in the river that water would run in the said Poso Slough more than twice as much water would flow into and through said Poso Slough as would have flowed through said slough in the natural condition or fall of said Poso Slough; and after the water in said river was of a sufficient depth to flow into said Poso Slough not more than one thirtieth (1/30) of the water flowing in said river above the elevation of the bottom of
88 said slough would flow into said Poso Slough in its natural condition before the changes therein made by complainant as herein alleged.

That none of said natural branches of said main channel of said San Joaquin River, in their natural condition, will receive or draw water from said San Joaquin River, until more than 400 cubic feet of water per second is flowing in said river opposite to the head of said natural branches.

That the San Joaquin & Kings River Canal & Irrigation Company is now, and at all the times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California;

That said corporation was organized at some time prior to 1875;

That Miller & Lux was a copartnership from a time prior to 1870, to and until the death of Charles Lux, who died on the 15th day of March, 1887, and the members of said copartnership were at all times Henry Miller and Charles Lux;

That said copartnership, at all times after the year 1890 to the time of its dissolution herein mentioned, owned more than fifty-one per cent. (51%) of the capital stock of said San Joaquin & Kings River Canal & Irrigation Company, and elected and controlled the Board of Directors of said San Joaquin & Kings River Canal & Irrigation Company; and Henry Miller is now, and ever since the *eyar* 1890 has been, the President and Manager of said San Joaquin & Kings River Canal & Irrigation Company;

That the said copartnership of Miller & Lux was dissolved by the death of said Charles Lux, one of said copartners; and Miller & Lux, a corporation, was organized under the laws of the State of California after the death of said Charles Lux, for the purpose of liquidating said copartnership of Miller & Lux, and for the pur-
89 pose of distributing the assets of Miler & Lux, a copartnership, to the persons entitled thereto; and all the land and property of said copartnership was transferred and conveyed to said Miller & Lux, a corporation, including the riparian land mentioned

herein as being owned by the complainant herein, in consideration of which said transfer of said property by the persons interested therein, all of the capital stock of said corporation, Miller & Lux, was transferred to said persons, that is, to each of said persons in the same proportion as each person was theretofore interested in said property of said copartnership;

That from the time of the organization of Miller & Lux, a corporation, organized under the laws of the State of California, to the time of the organization of the corporation complainant herein, said Miller & Lux, a corporation, organized under the laws of the State of California has been the owner of all of the capital stock of said San Joaquin & Kings River Canal & Irrigation Company which said copartnership of Miller & Lux had theretofore owned and said Miller & Lux, a corporation organized under the laws of the State of California at the time of the organization of complainant herein transferred and conveyed all of said capital stock so owned by it to the complainant herein, and said complainant herein has ever since been the owner thereof;

That Henry Miller is, and at all times since its organization has been the president and manager of said corporation Miller & Lux, organized under the laws of the State of California and of the corporation complainant herein and also since the year 1890 of said corporation the San Joaquin & Kings River Canal & Irrigation Company, and said copartnership of Miller & Lux from the year 1890 to the organization of said Miller & Lux, a corporation,
90 organized under the laws of the State of California, from the date of its organization to the date of the organization of complainant herein, and said complainant herein from the date of its organization to the present time has elected and controlled the Board of Directors of said San Joaquin & Kings River Canal & Irrigation Company, and of the corporation San Joaquin & Kings River Canal and Irrigation Company, Incorporated hereinafter named, that the Board of Directors of said San Joaquin & Kings River Canal & Irrigation Company and of San Joaquin & Kings River Canal & Irrigation Company Incorporated is, and at all times has been, seven (7); that during the time that the board of directors of said San Joaquin & Kings River Canal & Irrigation Company was elected and controlled by Miller & Lux, a copartnership, as aforesaid, five (5) of the persons who constitute said board of directors were the agents and appointees of said Miller & Lux, a copartnership; that during the time, as aforesaid, when said directors of said San Joaquin & Kings River Canal & Irrigation Company were elected and controlled by said Miller & Lux, a corporation organized under the laws of the State of California, five (5) of the persons who constitute said board of directors were also at the same time directors of the corporation, Miller & Lux, organized under the laws of the State of California; and during the time that complainant herein elected and controlled the board of directors, as aforesaid, of said San Joaquin & Kings River Canal & Irrigation Company, five (5) of the persons who were directors of complainant were also at the same time five (5) of the directors of said San Joaquin & Kings River

Canal & Irrigation Company, and of said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, and said Miller & Lux, a copartnership, Miller & Lux, a corporation, organized under the laws of the State of California, and Miller & Lux, Incor-
91 porated, complainant herein, each has at all times since the year 1890 during the time that it elected and controlled the Board of Directors of said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, directed and dictated all directors' meetings, all acts performed and done, and determined the character of all acts of said San Joaquin & Kings River Canal & Irrigation Company, a corporation, and of said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, including the time, place, character, manner and purpose of all diversions of water by said San Joaquin & Kings River Canal & Irrigation Company, and by San Joaquin & Kings River Canal & Irrigation Company, Incorporated.

That at all times since the year 1890 Henry Miller has been one of the Directors and President of said San Joaquin & Kings River Canal & Irrigation Company, and of San Joaquin & Kings River Canal & Irrigation Company, Incorporated since its said organization, and the Managing Agent of said San Joaquin & Kings River Canal & Irrigation Company, and of San Joaquin & Kings River Canal & Irrigation Company, Incorporated since its organization, who has had charge of and directed the diversion of water from the San Joaquin River, and its distribution by said corporations; and the said Henry Miller has also at all times aforesaid been the President and Managing Agent of Miller & Lux, a corporation, and for the complainant herein;

That the said business of said corporation, the San Joaquin & Kings River Canal & Irrigation Company, and of San Joaquin & Kings River Canal & Irrigation Company, Incorporated is conducted in the same offices and by the same subordinate officers as is the business of Miller & Lux, a corporation, and this com-
92 plainant;

That the San Joaquin & Kings River Canal and Irrigation Company, Incorporated, was organized in the year 1905, and upon its organization all the property, rights, privileges and franchises of said San Joaquin & Kings River Canal & Irrigation Company, a corporation, were transferred to said San Joaquin and Kings River Canal and Irrigation Company, Incorporated, and the entire capital stock of said San Joaquin and Kings River Canal & Irrigation Company, a corporation, was transferred to and has ever since been owned by the said San Joaquin and Kings River Canal and Irrigation Company, Incorporated.

That the complainant herein was organized as a corporation in the State of Nevada, as an agent of Miller & Lux, a corporation, organized under the laws of the State of California; and Miller & Lux, a corporation, so organized under the laws of the State of California, is the owner of all the capital stock of the complainant; and complainant has no existence, except as a mere agency of Miller

& Lux, a corporation, organized under the laws of the State of California; and all the property held by said complainant is as such agent, and so that suits may be brought and prosecuted in the United States courts; and said complainant does not transact any business or do any act or thing other than such as may be necessary to carry out the purposes of Miller & Lux, a corporation, organized under the laws of the State of California, except to hold title to property for the purpose of prosecuting suits in the United States courts:

That said copartnership was the owner of all the riparian lands now owned by the complainant herein, and the complainant is the successor in interest of said Miller & Lux, a copartnership, in and to said lands:

93 That the said Miller & Lux, a copartnership, while it was the owner of all said riparian lands herein mentioned as having been owned by complainant and its predecessor, and Miller & Lux, a corporation, successor of said Miller & Lux, a copartnership, gave permission to the said San Joaquin & Kings River Canal & Irrigation Company to divert from said San Joaquin River certain of the waters thereof into a ditch and canal, which had theretofore been constructed for that purpose, and to use the same for irrigation of the lands of said Miller & Lux, a copartnership, and said Miller & Lux, a corporation, and other lands:

That pursuant to said permission the said San Joaquin & Kings River Canal & Irrigation Company did divert from said San Joaquin River four hundred and sixty-two (462) cubic feet of water per second prior to the year 1899, at the times hereinafter stated; and after the year 1899 did, by virtue of said permission of said Miller & Lux, a copartnership, and Miller & Lux, a corporation, continue to divert said quantity of water from said river; and the San Joaquin & Kings River Canal & Irrigation Company has, since the year 1899, at divers times increased its diversion of water from said river by permission of the said Miller & Lux, a copartnership and Miller & Lux, a corporation:

That the place where said San Joaquin & Kings River Canal & Irrigation Company diverted said water is below said place of measurement and above all the sloughs herein mentioned, and also above the place where the defendant has diverted water into its canal, as hereinbefore stated:

That the said Miller & Lux, a corporation organized, existing and acting under the laws of the State of California, when it was the owner of all the riparian lands now owned by the complain-

94 ant, made and executed with the said San Joaquin & Kings River Canal & Irrigation Company that certain agreements in words and figures following:

"This agreement, made this 18th day of May, 1899, by and between The San Joaquin and Kings River Canal and Irrigation Company, a corporation organized and existing under the laws of the State of California, the party of the first part, and Miller & Lux, also a corporation organized and existing under the laws of said State, the party of the second part,

"Witnesseth: That, whereas, prior to the construction of the canal of the party of the first part, Henry Miller and Charles Lux were the owners of lands lying along and bordering upon the San Joaquin River, and its sloughs, in said State, and lying above and below the head of the canal of the party of the first part, and were the owners of riparian rights in and to the waters of said river and slough, and had been accustomed to and did actually use the waters of said river and sloughs which naturally overflowed said lands, and also to take water therefrom by artificial means, for the purpose of irrigating said lands and furnishing water for their cattle and live stock, and for other domestic uses, in accordance with their said riparian rights;

"And, whereas, said Henry Miller and Charles Lux, for the purpose of aiding the construction of said canal of the party of the first part, did pay to the party of the first part a subsidy in money, and conveyed to it a right of way for its said canal where the same passed through the lands of said Henry Miller and Charles Lux of a width of one hundred (100) feet on each side of the center line of said canal, and permitted the party of the first part to appropriate and divert from said river through said canal eight hundred (800) cubic feet per second of the water flowing in said river;

"And, whereas, at all times since said appropriation was made by the party of the first part, said Henry Miller and Charles Lux,
95 and said Henry Miller, as the survivor of them, and the party of the second part (as the successor in interest of said Henry Miller and Charles Lux) continued, as said riparian owners, to use the overflow waters of said river and sloughs upon said lands for the aforesaid purposes, and also to use, for the purpose of irrigation uncultivated land, and furnishing water for their live stock and for other domestic uses, and with the consent of the party of the first part, and without any charge therefor by it, the surplus water running in said canal not used or required by the water consumers of the party of the first part other than said Henry Miller, Charles Lux, and the party of the second part;

"And, whereas, during all said times it was understood by all said parties that said Henry Miller and Charles Lux, and said Henry Miller, as the survivor of them, and said party of the second part, as the successor in interest of them, were of right entitled to the said use, without charge, of the said surplus water in said canal; and that said party of the first part was of right entitled to waste said surplus water on said uncultivated lands;

"And, whereas, the party of the second part has agreed to permit the party of the first part to appropriate and divert from said river, through its "Outside Canal", three hundred and fifty (350) cubic feet per second of the water flowing in said river, in addition to the aforesaid eight hundred (800) cubic feet per second;

"Now, therefore, in consideration of the premises, and to the end that the rights of the respective parties hereto, as heretofore understood and recognized, may be fixed and established, the party of the first part does hereby confirm unto said party of the second part the right to use, for the purposes of irrigation the said uncultivated lands above referred to, and of furnishing water for its
96 cattle and live stock, and for other domestic uses, free of cost

or charge to it, all or so much of the surplus water running in the canals of the party of the first part as the party of the second part may desire to use for said purpose, and which may not be used or required by the other water consumers of the party of the first part; and said party of the second part does hereby confirm unto said party of the first part the right to waste said surplus water on said uncultivated land;

"And the party of the first part does hereby acknowledge and declare that it has no claim to make against the party of the second part, or its predecessors in interest, on account of the use heretofore made by it and them of said surplus water.

"In witness whereof, the said parties hereto have caused these presents to be subscribed by their respective presidents and secretaries, under their respective corporate seals, all on the day and year first above written.

THE SAN JOAQUIN AND KINGS RIVER CANAL & IRRIGATION CO.,
By HENRY MILLER, *President*,
By C. Z. MERRITT, *Secretary*.
MILLER & LUX,
By HENRY MILLER, *President*,
By DAVID BROWN, *Secretary*."

That the said San Joaquin & Kings River Canal & Irrigation Company, after said contract last above mentioned was made, continued to divert water from said river, under the permission of Miller & Lux, a corporation, therein given until the organization of
97 said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, and San Joaquin & Kings River Canal & Irrigation Company, Incorporated has since its organization continued to so divert said water under the same permission.

That of the water so at all times so diverted by said San Joaquin & Kings River Canal & Irrigation Company, and by San Joaquin & Kings River Canal & Irrigation Company, Incorporated, at least one-fourth (¼) thereof has at all times been used to irrigate the riparian lands of said Miller & Lux, a copartnership, and Miller & Lux, a corporation, and complainant herein, its successor, below the place where the said San Joaquin & Kings River Canal & Irrigation Company has heretofore diverted said water from said river, as aforesaid, and above the place where the defendant has diverted its water, as hereinafter stated;

That the said riparian lands which have been so irrigated by the use of said water diverted by said San Joaquin & Kings River Canal & Irrigation Company, and by said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, exceed two-thirds (⅔) of all the riparian lands owned by said Miller & Lux, a copartnership, Miller & Lux, a corporation, and complainant, its successor, which are situated above the place of diversion by said defendant, as hereinafter stated;

That the said San Joaquin & Kings River Canal & Irrigation Com-

pany, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, since its organization has at all times, pursuant to said permission and said contract herein alleged, diverted said four hundred and sixty-two (462) cubic feet of water per second from said San Joaquin River, whenever there was flowing in said river in excess of five hundred twenty (520) cubic feet of water per second at the said place where the said San Joaquin River
98 Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, diverts its water from said river;

That said four hundred and sixty-two (462) cubic feet of water per second, so diverted by said San Joaquin & Kings River Canal & Irrigation Company, and by said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, is, and at all times has been, when but five hundred and twenty (520) cubic feet of water per second are or were flowing, more than the just and reasonable share to which complainant is entitled to use, or to which Miller & Lux, a corporation, was entitled to use, or to which Miller & Lux, a copartnership, was entitled to use; and one-fourth of said four hundred and sixty-two (462) cubic feet of water per second, at said time and stage of water in said river, are and at all times have been more than the just and reasonable share of water which complainant is entitled to use, or which its predecessors, Miller & Lux, a corporation, or Miller & Lux, a copartnership, were entitled to use;

That said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, since its organization, pursuant to and under the said permission and said contract with Miller & Lux, has, as the quantity of water flowing in said river increased, increased the quantity of water diverted by it, but has at all times taken more water from said river, at whatever stage of water, than the just and reasonable share of the water flowing in said river, which said complainant was entitled to use, and more than Miller & Lux, a copartnership, or Miller & Lux, a corporation, were entitled to use;
99 That since the year 1890, the said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, since its organization has, pursuant to and acting under the permission of the complainant, and of said Miller & Lux, a copartnership, and of Miller & Lux, a corporation, and pursuant to and acting under the permission contained in said contract dated May 18, 1899, diverted from said river, at said place of diversion, in excess of one-tenth (1/10) of all the water flowing in said river, when the flow of said river was less than four thousand cubic feet of water per second, and said complainant has at all times, and the predecessors of complainant have at all times since the year 1890, when the said quantity of water flowing in said river was less than four thousand (4000) cubic feet of water per second, taken, received and used more than one-tenth (1/10) of the flow of said river, at such times, which water has been so used upon and for the irrigation of the said ri-

parian lands now owned by complainant, above the said place where defendant is diverting, and has at all times diverted water;

That the flow of water in said river varies, that is to say, when there are heavy rains and during the months of May, June and to July 15th of ordinary years when the snow is melting, the flow of water in the river is in excess of four thousand (4,000) cubic feet per second, and at all other seasons of the year the flow of water in said river is less than four thousand (4,000) cubic feet per second, and from said times in each year the flow of the water in said river gradually decreases, until the minimum flow is reached during September and October of each year;

100 That there has at all times been a large amount of seepage into the said river channel from irrigation along the banks thereof on the riparian lands of the said complainant and its predecessors in interest and estate, from the waters so diverted by said San Joaquin & Kings River Canal & Irrigation Company, and by San Joaquin & Kings River Canal & Irrigation Company, Incorporated, since its organization, and from waters diverted from said river by complainant and its predecessors, which were returned to the said river channel, so that at no time prior to the year 1898 did there flow in the said channel of said San Joaquin River, at the place hereinafter mentioned where the defendant diverts water therefrom, less than one hundred (100) cubic feet of water per second; and since the year 1898 the said complainant and the said Miller & Lux, a corporation, has, by and through its control of said San Joaquin & Kings River Canal & Irrigation Company, and by said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, as aforesaid, and by diverting water from said San Joaquin River above the place where said defendant diverts, and has diverted, water, as hereinafter stated, sought to deprive the defendant of the water it was entitled to receive from said San Joaquin River, and has sought to prevent the water flowing in said river at low stages thereof from reaching the head of defendant's canal, and particularly to deprive the defendant of all, or so much as it could, of the said one hundred (100) cubic feet of water per second, so flowing in said river, at the lowest stages of water in said river, and of all, or so much as it could, of the water owned by and which the defendant was entitled to divert from said river; and in order to so deprive the defendant of said water, the complainant has, below the place where the said San Joaquin & Kings River Canal & Irrigation

101 Company diverts its water, as aforesaid, and above the said Deep Slough and above the place where the defendant diverts its water, as hereinbefore mentioned, widened the channel and dug out and lowered the elevation of the bottom of each Temple Slough and Poso Slough, hereinabove mentioned, so as to draw, and complainant has drawn, from the said river channel into said slough a large portion of said water to which the said defendant is entitled, and has thereby caused less than said one hundred (100) cubic feet of water per second to flow in said river channel at the said place of diversion by defendant at the lowest stage of said water in said river, and that, too, when the complainant was taking, diverting and

using from the water in said river more than the just and reasonable proportion of the water flowing in said river to which the complainant was entitled, and as the rights of said complainant are herein stated and defined;

And complainant, and its predecessors Miller & Lux, a corporation have diverted water into each of said sloughs which would not run therein naturally, have diverted water into said sloughs at times and stages of the water in said river when no water whatever would run into said sloughs in their natural condition and said complainant has so diverted said water into said slough at a time when said complainant and its predecessors, Miller & Lux, a corporation, were taking, diverting and using for the irrigation of their said riparian lands more water than was the just and reasonable proportion of said water of said river to which the complainant, or its predecessors was entitled, and at a time when there was not flowing in said San Joaquin River at the place where defendant diverts water into its canal the quantity of water to which defendant was entitled to divert, and at such times the defendant claims and asserts a
102 right to build a dam around the head of said Deep Slough, Temple Slough and Poso Slough, and said other natural branches of the main channel of the San Joaquin River, and at such times the defendant has ever- year since the year 1897 constructed the said dam around the head of said Deep Slough and stopped the water from flowing therein only to the extend that the water to which the defendant was entitled to divert had been withdrawn above said Deep Slough by the acts of said complainant or its said predecessors; and said complainant its predecessors, said Miller & Lux, a corporation, have diverted, and for more than two years last past have diverted, water into said three sloughs which would not have run therein naturally; and complainant and its said predecessors have so diverted said water into said Poso and Temple Sloughs at a stage of the water flowing in the said river when the water would not have run in said sloughs, at all, had the bottom of said sloughs been at their natural elevation and as the same were before the said bottom of said sloughs were lowered by complainant, and the said Miller & Lux, a corporation, predecessor of complainant; and complainant and its said predecessors have so diverted said water into said sloughs, at a time when said complainant and its said predecessor, Miller & Lux, a corporation, were at other places taking, diverting and using from said river for irrigation of their lands above the place of diversion by defendant, more water than was the just and reasonable proportion of said water to which complainant and its said predecessor, Mille. & Lux, a corporation, were entitled, as herein defined and stated, and at a time when there was not flowing in said San Joaquin River at the place where defendant diverts water into its canal, as hereinbefore stated, the water
103 to which defendant was entitled as herein defined and stated, and at such times the defendant constructed and maintained the said dam as alleged in the supplemental complaint herein, at the head of said Deep Slough, and at such times the defendant claims and asserts the right to build and maintain a dam and obstruction

around the head of each of said sloughs and natural branches of the main channel of said River, and to prevent the flow of water therein from the said River; and at such times as the complainant and its predecessor, Miller & Lux, a corporation, were so taking, diverting and using the said quantity of water from the said San Joaquin River, and were so diverting said water into said sloughs at places above said Deep Slough, the defendant constructed the said dam around the head of said Deep Slough for the purpose of stopping and did stop, the water which would naturally flow in said Deep Slough, from flowing into said Deep Slough, only to the extent that the water to which defendant was entitled to divert had been withdrawn from said river channel above said Deep Slough by the said act of said complainant or its said predecessor, Miller & Lux, a corporation, and the said defendant claims and asserts that in so building said dam around the head of said Deep Slough and obstructing the flow of water therein, it was acting within its rights in the premises;

That ever since and including the year 1898, whenever the quantity of water flowing in the San Joaquin River, at the places hereinbefore mentioned, where defendant has diverted water from said San Joaquin River, was less than the quantity of water to which said defendant was entitled to divert from said river, and said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, since its organization, was pursuant to said permission of said complainant or its predecessor, Miller & Lux, a corporation, or
104 pursuant to said contract dated May 18, 1899, was diverting more water than the just and reasonable proportion thereof to which Miller & Lux, a corporation, or the complainant, its successor, was entitled to divert and use from said river, or whenever the quantity of water being diverted by said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, since its organization, pursuant to said permission and contract, dated May 18, 1899, added to the water being diverted by said complainant, or by its said predecessor, Miller & Lux, a corporation, exceeded the just and reasonable proportion of the water flowing in said river to which said complainant, or said Miller & Lux, a corporation, its predecessor, was entitled, then the defendant has built, constructed and maintained said dam around the head of said Deep Slough to prevent, and which did prevent, the water from running into said Deep Slough which would naturally run into said Deep Slough, to the extent to which said diversion being then made by said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated and since its organization, or to the extent to which said diversion then being made by said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, since its organization, added to the diversion by said complainant, or Miller & Lux, its predecessors, exceeded the quantity of water to which said complainant or said Miller & Lux, its

said predecessors, was entitled, as hereinbefore stated and defined, and in so doing the defendant was acting within its rights in the premises; and the defendant claims and asserts the right to build a dam or other obstruction around the head of each of said sloughs and other natural branches of said River, and to prevent
105 water flowing thereon from said River, at such times and under such circumstances.

That, ever since and including the year 1898, whenever the quantity of water flowing in the San Joaquin River at the place hereinbefore mentioned, where defendant has diverted water from said San Joaquin River, was less than the quantity of water which said defendant was entitled to divert from said river, as hereinbefore stated and defined, and said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, since its organization was, pursuant to the said permission of said complainant, or its said predecessors, Miller & Lux, or pursuant to said contract, dated May 18, 1899, was diverting more water than the just and reasonable proportion thereof to which complainant or Miller & Lux, a corporation, its predecessor, was entitled to divert and use from said river, as herein stated and defined, or whenever the quantity of water being diverted by said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, since its organization, pursuant to said permission and contract, dated May 18, 1899, added to the water being diverted by said complainant, or by its said predecessor, Miller & Lux, a corporation, exceeded the just and reasonable proportion of the water flowing in said river to which said complainant, or said Miller & Lux, a corporation, its predecessor, was entitled, then the defendant has built, constructed and maintained said dam around the head of said Deep Slough to prevent, and which did prevent, the water from running into said Deep Slough, to the extent to which said diversions being then made by said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, since its
106 organization, or to the extent to which said diversion then being made by said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, since its organization, added to the diversion by said complainant, or Miller & Lux, its predecessors, exceeded the quantity of water to which said complainant, or said Miller & Lux, its predecessors, was entitled to divert and use as herein stated and defined, and in so doing the defendant was acting within its rights in the premises; and at such times and under such circumstances the defendant claims and asserts a right to build and maintain a dam around the head of each of said sloughs and said natural branches of the main channel of the said river, and prevent the water flowing into said slough and said natural branches of said main channel of said River, from said river.

That whenever there was less water flowing in the San Joaquin River, at the place of diversion by defendant hereinbefore stated,

than the defendant was entitled to receive and divert from said river, as herein stated and defined, and water was flowing in said Deep Slough which would not flow in said Deep Slough in the natural condition of said river and said Deep Slough*m*, whether said water was caused to flow therein by the said deposit of silt, detritus, sand and mud which had been caused to be deposited in said river channel*k*, as hereinbefore stated, or whether the said water was caused to flow therein by the dam of defendant impounding and backing the water up in the channel of said river, as hereinbefore stated, or whether the said water was caused to flow therein by the act of the complainant in lowering the bottom of said slough and removing obstructions therefrom, as hereinbefore stated, the defendant has built around the head of said Deep Slough and there maintained a dam for the purpose of preventing, and which did prevent, the said water which would not naturally flow in said Deep
107 Slough from flowing therein, and in so doing the defendant was acting within his rights in the premises;

That the said defendant never at any time maintained said dam around the head of said Deep Slough or obstructed the water from flowing into the head of said Deep Slough when the stage of water flowing in said river is two hundred (200) cubic feet per second or less at the place of measurement, and when at the same time more than one hundred and fifty (150) cubic feet of water per second was flowing down the channel of said river to the said place where defendant diverts water into its canal; and the said defendant claims the right to obstruct the water which would naturally flow in said Deep Slough, Poso Slough or Temple Slough or which is caused to flow therein by artificial means or change, when the said complainant, or others by its license or permission, is diverting from the said river channel above the head of said sloughs more than complainant's reasonable share or proportion of the water flowing in said river channel, as herein stated and defined; and there is not flowing at said River, at the defendant's place of diversion the quantity of water to which defendant is entitled as hereinbefore stated and defined.

That the said defendant does not claim and does not assert a right to maintain a dam around the head of said Deep Slough, or any other of the natural branches of the main channel of the said San Joaquin River, so as to prevent the water which would flow therein in their natural condition, other than at the times and in the manner and for the purposes herein alleged;

That the complainant and its predecessor, Miller & Lux, a cor-
poration, has at all times received upon and used upon the
108 riparian lands described in complainant's supplementary bill of complaint herein more than the just and reasonable share and proportion of the water flowing in the San Joaquin River to which complainant, or said Miller & Lux, its predecessor, was entitled to use and receive thereon, which said water, so received and used to irrigate said land, was a part of the water diverted by said San Joaquin & Kings River Canal & Irrigation Company, and by said San Joaquin & Kings River Canal & Irrigation Company, In-

corporated, since its organization by permission of said complainant, or said Miller & Lux, its predecessor, and pursuant to the said contract of May 18, 1899;

That the words "defendant's dam," when used herein are to be understood as referring to the dam across the said river at the place on the said river where the water is, and at all times has been, diverted into defendant's canal, unless the words show that they have been otherwise used;

That the words "defendant's place of diversion," when used herein, are to be understood as referring to the place on the said San Joaquin River where water is, and at all times has been, diverted into defendant's canal, unless the words show that they have been otherwise used;

The defendant denies that by means of said alleged dam or dams by defendant, or which may hereafter be built by it, around the head of said Deep Slough, or said other natural branches of the main channel of the said San Joaquin River; the defendant will prevent the flow into said Deep Slough or said natural branches of all of the water of said river, or any of the water of said river, except as herein expressly alleged, or that defendant will cause any water in said river to flow down the main channel
109 of said river to the head of defendant's canal, which would not otherwise — their flow, except as herein expressly alleged; defendant denies that the claims of the defendant herein particularly and specifically stated to the waters of said San Joaquin River to do and perform all the acts which it herein claims the right to do and perform, are or that either or any of them is without right, or wrongful; denies that the defendant has not the right to divert all of the water which it has heretofore diverted, as herein expressly stated; denies that the defendant has not the right to obstruct the flow of said river into said Deep Slough and other natural branches or channels of said river, and in said river as hereinbefore alleged; denies that the defendant has no right to interfere with the flow of the San Joaquin river in the manner and to the extent that it has heretofore interferred with the flow thereof.

15. Admits that the matter in dispute herein, as alleged in complainant's amended bill of complaint, exceeds exclusive of interest and cost the value of $5000.00; denies that any of the acts, doing or claims of the said defendant, as herein expressly alleged, are contrary to equity or good conscience, or that they tend to the manifest wrong, injury or oppression of complainant.

16. Denies that the bottom of said Deep Slough at its head was at any time prior to the diversion of water by defendant, as hereinbefore alleged, on so low a level that the water flowing in said San Joaquin River naturally or at all flowed out of said main channel of said river and through said Deep Slough, except as hereinbefore stated and admitted;

Denies that the complainant has used a large, or any part, of the waters which flowed in said Deep Slough for the irrigation of said lands described in Schedule "A" annexed to complainant's amended

bill of complaint, or to supply water for stock or for domestic
110 or other purposes in connection with said land; denies that the dam or any dam constructed by defendant around the head of said Deep Slough, as herein stated and admitted obstructed or prevented any water flowing from said river into said Deep Slough, which would have flowed down, through or over said lands described in said Schedule "A" had said dam not been constructed by said defendant;

Admits that on the 9th day of August, 1905, complainant caused a dam which had theretofore been erected by defendant around the head of Deep Slough to be removed and that thereafter defendant constructed another dam at and around the head of said Deep Slough and prevented the water which was then flowing in said river from flowing into and down said slough as aforesaid, and that said dam was thereafter removed by the complainant; and denies that the construction of said dam was wrongful and alleges that the same was so constructed within the rights of defendant; admits that the said dams, and each of them, heretofore erected around the head of said Deep Slough were placed at and across the head of said Deep Slough by defendant wholly in aid of, and for the purpose of the diversion of the waters of said river made by defendant into and through its said canal, that the defendant threatens to and will continue to construct and reconstruct a dam or dams around the head of said Deep Slough, so as to prevent the waters of said San Joaquin River from flowing into and through said sloughs and down to and through and over the lands of complainant at the times and under the circumstances and for the purposes hereinbefore alleged, but denies that the defendant threatens to and will construct or reconstruct said dam at any other time or under any other circumstance, or for any other purpose, and admits that the waters of said San Joaquin River, which the said defendant will prevent running into
said Deep Slough by dams to be constructed around the head
111 of said Deep Slough will cause the same to flow down to the head of defendant's said canal and there will divert the same water from said river to use and consume the same as hereinbefore alleged.

And this defendant in addition to the foregoing answer avers that the cause of action if any there may be arising to the complainant on account, or by reason of the several allegations and complaints in its said amended bill, supplemental bill contained, did not accrue within five (5) years before the original bill was filed herein, and this allegation the defendant makes in bar of the complainant's bill and prays that they may have the same benefit therefrom as if they had formerly pleaded the same.

And these defendants in addition to the foregoing answer aver that the cause of action, if any there may be arising to the complainant on account or by reason of the several allegations and complaints in their said amended bill herein contained did not accrue within five (5) years before the original bill was filed herein and this allegation the defendant makes in bar of the complainant's bill and prays that

they may have the same benefit therefrom as if they had formerly pleaded the same.

And this defendant in addition to the foregoing answer avers that the cause of action, if any there may be arising to the plaintiff on account or by reason of the several allegations and complaints in their supplemental bill contained did not accrue within five (5) years before the original bill was filed nor within five (5) years before the said supplemental bill was filed, and this allegation the defendant makes in bar of the plaintiff's bill and prays that they may have the same benefit therefrom as if they had formerly pleaded the same.

112 And this defendant answering says, that the cause of action if any there be arising to complainants on account or or by reason of the several allegations and complaints in its said amended bill of complaint did not accrue within five (5) years before the original bill was filed and that this action is barred by reason of the provisions of Section 318, Section 319 and Subdivision 2 of Section 338 of an act of the Legislature of the State of California entitled, "An act to Establish a Code of Civil Procedure of the State of California" and by Section 1007 of an act of the Legislature of the State of California entitled "An act to establish a Civil Code" and this allegation the defendant makes in bar of the complainant's bill and prays that they may have the same benefit therefrom as if they had formerly pleaded the same.

And this defendant answering says, that the cause of action if any there be arising to complainant on account of or by reason of the several allegations and complaints in its said supplemental bill of complaint did not accrue within five (5) years before the original bill was filed and that this action is barred by reason of the provisions of section 318, Section 319, and Subdivision 2 of Section 338 of an act of the Legisla*u*re of the State of California entitled, "An Act to Establish a Code of Civil Procedure of the State of California" and by Section 1007 of an act of the Legislature of the State of California entitled "An Act to Establish a Civil Code" and this allegation the defendant makes in bar of the supplemental bill and prays that they may have the same benefit therefrom as if they had formerly pleaded the same.

Wherefore this defendant prays that the complainant's amended bill of complaint and supplemental bill be dismissed and that

113 orders heretofore made in the premises be vacated and that this defendant have and recover his costs of suit herein incurred.

[SEAL.] EAST SIDE CANAL AND IRRIGATION COMPANY, *Defendant*.
By SAMUEL STEVINSON, *President*.

JAMES F. PECK.
Solicitor for Defendant.

I hereby certify that in my opinion the foregoing answer is well founded in point of law.

JAMES F. PECK.
Counsel for Defendant.

Due service of the foregoing answer is hereby admitted this 7th day of April, 1906.

R. E. HOUGHTON,
Solicitor for Complainant.

(Endorsed:) No. 92. In the Circuit Court of the United States for the Southern District of California, Northern Division. Miller & Lux, Incorporated, a corporation, Complainant, *vs.* The East Side Canal & Irrigation Company, a corporation, Defendant. Answer. Filed Apr. 9, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. James F. Peck, Attorneys at Law, Mills Building, San Francisco.

114 In the Circuit Court of the United States for the Southern District of California, Northern Division.

In Equity. No. 92.

MILLER & LUX, INCORPORATED, a Corporation, Complainant,
vs.
THE EAST SIDE CANAL & IRRIGATION COMPANY, a Corporation, Defendant.

THE EAST SIDE CANAL & IRRIGATION COMPANY, a Corporation, Cross-Complainant,
vs.
MILLER & LUX, INCORPORATED, a Corporation, Defendant.

To the Judges of the Circuit Court of the United States for the Southern District of California, Northern Division:

The East Side Canal & Irrigation Company, a corporation and citizen of the State of California, having its principal place of business and residence at Merced County, State of California, brings this, its cross-bill, against Miller & Lux, Incorporated, a corporation organized and existing under the laws of the State of Nevada, and a citizen of the State of Nevada, having its principal place of business at Carson City, State of Nevada, and thereupon your orator complains and says:

115 1. That the cross-complainant is a corporation organized, existing and acting under the laws of the State of California, and having its principal place of business at Merced County, State of California, within the Southern District of California, Northern Division, and is a citizen of the State of California.

2. That the complainant in the original bill of complaint herein is a corporation organized, existing and acting under the laws of the State of Nevada, and having it principal place of business at Carson City, State of Nevada, and is a citizen of the State of Nevada.

3. That said complainant in said original bill of complaint herein, defendant in this cross-complaint, exhibited in this court its original bill of complaint in this suit against this cross-complainant on the

15th day of June, 1905, and on that day a writ of *subpœna ad respondendum* was issued out of this court upon said bill, and was thereafter served upon this cross-complainant on the — day of June, 1905, and thereafter, on the — day of ——, 1906, the said complainant filed in this court its amended bill of complaint and its supplemental bill of complaint in this suit, and said defendant in said suit, the cross-complainant herein, has appeared in this court in this suit, and said cross-complainant filed its answer in said court at the time it filed this, its cross-complaint.

4. That in and by its said bill of complaint and its said supplemental bill of complaint the said complainant alleged and set forth that it was the owner of certain lands in said amended bill of complaint particularly described, which said lands are situated in said State of California, Southern District of California, Northern Division; that the same are situated on a stream or water course known as the San Joaquin River and hereinafter mentioned, and
116 that it was the owner of, and was entitled to use as a riparian owner, certain of the waters from said river for the irrigation of its said lands, for stock and domestic purposes, and by said amended bill of complaint and said supplemental bill of complaint it further alleged that the defendant in said amended bill of complaint and supplemental bill of complaint mentioned had been and was diverting the waters of the San Joaquin River at a certain place upon said river, above the said lands of said complainant, and that said defendant was continuing said diversion, and that said defendant was constructing dams and other obstructions around the head of certain natural branches of the main channel of said river hereinafter mentioned which connect with the said main channel of said river, at places above the said place where defendant diverts the water from said river, so as to confine the water flowing in said river in the said main channel of said river until the water, so confined in said river, reached the head gate and place where the defendant diverted water from said river, where said water, so confined in said channel of said river by damming said natural branches of said main channel of said river, was diverted from said river into the canal of said defendant, and away from the said lands of said complainant, which water, it is alleged, would, had defendant not constructed said dam, otherwise have flowed by, to, over and through the said lands of complainant, and which water, it is alleged, will at all times, in the absence of said dams around the head of said natural branches of said main channel of said river, — was diverted from said river into the canal of said defendant, and away from the said lands of said complainant, which water, it is alleged, would, had defendant not constructed said dam, otherwise have flowed by, to, over and through the said lands of complainant, and which water, it is alleged, will at all times, in the absence of said dams around the head of said natural branches of said main channel of said
117 river, flow through, by, to and over said lands mentioned and described in said amended bill of complaint; and it is alleged therein that defendant therein claims and asserts a right to build and construct said dams around the head of said natural

branches of said main channel of said river, and that said defendant will, unless restrained, continue to build said dams around the head of said natural branches of said main channel of said river, and to divert water, so confined thereby to said main channel of said river, into the defendant's said canal; that by said diversion of said water defendant thereby deprived, and is depriving and threatened to deprive said complainant of a large portion of the water to which it so alleged itself to be entitled, to the great and irreparable damage of the said complainant; and that said diversion, so made and threatened to be made by said defendant, and said dams so heretofore constructed by said defendant, and hereafter threatened to be constructed and maintained around the head of said natural branches of said main channel of said river by said defendant, are without right, but that said defendant is making the same under a claim of right so to do and adversely to said complainant; and said complainant therein prayed the court, among other things, that said defendant be forever enjoined and restrained from diverting any water from the said river above the said lands described in said amended bill of complaint, and that it be adjudged and decreed by this court that said defendant has no right to obstruct the waters in the said San Joaquin River or any portion thereof, or to obstruct the waters which naturally flow from said river into any of the channels of said river down to the said lands described in said amended bill of complaint, by dams, levees, sticks, earth or otherwise, or to divert any of the waters of said river in any manner or at any point,
118 so as to affect or interfere with their flow down said river or any of the channels of said river to, through or over the said lands described in said amended bill of complaint, and that the said defendant be forever enjoined and restrained from diverting or obstructing the waters of the said San Joaquin River or any of the channels of said river by dams, levees, sticks or earth placed in the bed of said river or in any of the channels of said river, or otherwise, and from maintaining, strengthening, completing or enlarging any dam or levee which has already been begun or erected for the purpose of diverting or obstructing the said waters, or from interfering in any way with the water above complainant's said lands, and from diverting any water from the said river above complainant's said lands, and that said defendant be required to remove all obstructions of every kind placed by it in the bed of said river or in any of the channels of said river, or in any of its branches or tributaries which interfere with the flow of the water in said river down to said lands described in said amended bill of complaint, and that complainant might have such other and further relief as the nature of the case may require.

5. That the said San Joaquin River is a natural stream and water course which flows, and from time immemorial has flown, from the Sierra Nevada Mountains to the bay of San Francisco, through the counties, among others, of Fresno, Madera, Merced, Stanislaus, San Joaquin, Contra Costa and Solano, which said San Joaquin River is a well defined stream with well defined channel, bed and banks throughout its entire course.

6. That that part of the San Joaquin River channel which is above the dam and place where cross-complainant diverts water, as hereinafter stated, is in Merced County, State of California, and in the Southern District of California, Northern Division.

119 7. That the purposes for which the cross-complainant was organized were, among other things, those of appropriating and acquiring the title to water and the right to use water in the State of California for sale, rental and distribution.

8. That the cross-complainant is, and ever since the year 1887 has been, the owner of, and at all the said times has had the right to divert and use, *of* the water naturally flowing in the San Joaquin River, five hundred (500) cubic feet per second when five hundred (500) cubic feet per second of water is naturally flowing or may hereafter be naturally flowing in the San Joaquin River at the place of diversion hereinafter mentioned; and when less than five hundred (500) cubic feet of water per second is naturally flowing or may hereafter naturally flow in said San Joaquin River at said alleged place of diversion, then the cross-complainant is, and at all times since the year 1887 has been, the owner of, and has had the right to divert and use all the said water so naturally flowing at said alleged place of diversion.

9. That the cross-complainant in the year 1887, and at all times since, honestly and in good faith claimed to own, and honestly and in good faith claimed the right, and honestly and in good faith believed it had the right, as such owner, to divert and use for irrigation, sale, rental and distribution five hundred (500) cubic feet of water per second of the water flowing in the San Joaquin River by the alleged place of diversion by the cross-complainant, when that quantity of water was naturally flowing in said River by that place, and when less than that quantity of water was flowing in said river by said place, then cross-complainant honestly and in good faith claimed the right, and honestly and in good faith believed it had the right, as such owner, to divert all the water so flowing naturally in said river.

120 10. That all persons interested in Miller & Lux, a copartnership or the property thereof, and Miller & Lux, a corporation, the grantors and predecessors in title of said Miller & Lux, Incorporated, in and to all the lands now or at any time owned by said Miller & Lux, Incorporated, and said Miller & Lux, Incorporated, at all times knew all the facts herein alleged, and knew of the said claim of cross-complainant to said quantity of water, and of the said claim of said cross-complainant to the right to divert the said quantity of water, and said predecessors of said Miller & Lux, Incorporated, consented to and acquiesced in the said claim of ownership by cross-complainant and said claim of right by cross-complainant to divert said water by said cross-complainant; and said predecessors of Miller & Lux, Incorporated, at all times knew what such predecessors' right and title to said waters of said San Joaquin River were.

11. That in the year 1887 the cross-complainant commenced the construction of a ditch and canal with sufficient capacity to convey

and carry five hundred (500) cubic feet of water per second, with the purpose of extending the same to the San Joaquin River at and near Section 17, Township 9 South, Range 12 East, Mount Diablo Base and Meridian, and diverting from said river into said canal five hundred (500) cubic feet of water per second when that quantity of water was flowing in said river at cross-complainant's said place of diversion; and when less water than five hundred (500) cubic feet of water per second was so flowing, then all the water that was so flowing.

12. That the then owners of all the property now owned by said Miller & Lux, Incorporated, had knowledge and knew of said ditch and canal and of what had been done by the cross-complainant and of the intention of the said cross-complainant and of the said claim of the cross-complainant to the waters of said San Joaquin River.

121 13. That the predecessors of said Miller & Lux, Incorporated, owned certain lands, which said lands are now all owned by said Miller & Lux, Incorporated, and over and through which said lands cross-complainant, in the year 1887, proposed and intended to dig and construct said ditch and canal to said San Joaquin River, and over which said lands and through which said canal, after said canal should be built and constructed, the said cross-complainant proposed and intended to flow the said water so by it to be diverted, and the then owner of said lands knew then and had full knowledge of all said purpose and intentions of said cross-complainant.

14. That said Miller & Lux, Incorporated, is the grantee and successor in title to all the lands heretofore owned by Miller & Lux, a copartnership, and by Miller & Lux, a corporation.

15. That in the month of August, 1887, before the completion of said canal by the cross-complainant, and a short time after the cross-complainant had commenced to build and construct said canal, the cross-complainant and the predecessors in interest and title of Miller & Lux, Incorporated, to all the property now or at any time owned by said Miller & Lux, Incorporated, who were at said times the owners, and which said predecessors of Miller & Lux, Incorporated, then well knew their own rights in and to the waters of the said San Joaquin River, and who then well knew of the cross-complainant's claim of right thereto, made an agreement wherein and whereby the said predecessors in interest and in title of said Miller & Lux, Incorporated, to the land and property now owned by said Miller & Lux, Incorporated, agreed with the cross-complainant, among other things, to convey to the cross-complainant a right of way and right to enter upon certain of the said lands of said predecessors of said Miller & Lux, Incorporated, and thereon to construct said above described canal so intended by the said cross-complainant to be con-

122 structed, which said lands so to be entered upon did not include any of the lands described in schedule A annexed to the amended bill of complaint filed in this suit; and it was further provided in said agreement for said right of way that the right of

way agreed to be conveyed should be held and be enjoyed by the cross-complainant and its successors and assigns so long as the canal so to be built was used for carrying water therein for the purposes of said cross-complainant and it was further provided in said agreement that if the said cross-complainant should cease to operate said canal for a period of two years consecutively, said right of way should cease and be at an end and said cross-complainant in and by said agreement, in consideration of said right of way so to be granted by said predecessors of Miller & Lux, Incorporated, covenanted and agreed with said predecessors of Miller & Lux, Incorporated, that whenever the said canal so to be constructed shall be used for carrying water, said predecessors of said Miller & Lux, Incorporated, should have the right to have and receive therefrom and that there should be delivered and turned out of said canal to said predecessors of said Miller & Lux, Incorporated, and to the grantees, heirs and assigns of said predecessors of Miller & Lux, Incorporated, at places along the line of said canal, where said canal should run through the lands of said predecessors of Miller & Lux, Incorporated, fifty (50) cubic feet of water per second of the natural flow of said canal so long as there was not less than two hundred (200) cubic feet of water per second flowing in the said canal above the place from which the said fifty (50) cubic feet of water per second was taken, and when there was less than two hundred (200) cubic feet of water per second flowing in said canal so to be constructed, the said predecessors of Miller & Lux, Incorporated, and the grantees, heirs and assigns of said predecessors of Miller & Lux, Incorporated, were to receive and
123 should receive one-fifth (1/5) of all the water flowing in said canal until the amount was reduced to one hundred (100) cubic feet of water per second, and after the water flowing in said canal was reduced to one hundred (100) cubic feet of water per second, the said predecessors in interest of Miller & Lux, Incorporated, were to be entitled to no water, except that all of the cattle and live stock of said predecessors of Miller & Lux, Incorporated, were to be permitted to enter upon said right of way and canal, and drink the water flowing in said canal, and for domestic purposes; and by said contract it was further provided that the said cross-complainant should at such places as were designated by said predecessors of Miller & Lux, Incorporated, upon 30 days' previous notice, construct and thereafter maintain suitable gates and stop-gates in the canal, so that there might be delivered and measured the water to which said predecessors of Miller & Lux, Incorporated, were entitled; and it was further agreed therein that the then predecessors of Miller & Lux, Incorporated, after the said canal then contemplated to be built should be constructed, should execute and deliver to said cross-complainant a deed of conveyance granting the said right of way to the said cross-complainant, and that the said cross-complainant should then execute and deliver and covenant to execute and deliver to the said predecessors of Miller & Lux, Incorporated, an agreement covenanting to supply and deliver the water as by said agreement

provided, and containing all the conditions of said agreement so to be kept and performed by cross-complainant; and it was further provided in said agreement that the right of way so agreed to be conveyed by said predecessors of Miller & Lux, Incorporated, and the water so to be furnished and delivered by said cross-complainant, were conditions of said contract, depending one upon the other.

124 *15.* That at the time of making said agreement there were, and at all times since there have been, numerous persons other than the parties to said agreement who were the owners of riparian lands along the banks of said San Joaquin River, both above and below the said place where the cross-complainant intended to divert said water from said river.

17. That the cross-complainant, so claiming to own said water and so claiming the right to divert the same, did in the year 1887, after the making of the said agreement with the said predecessors of Miller & Lux, Incorporated, with the knowledge and acquiescence of said predecessors in interest of Miller & Lux, Incorporated, construct a canal with sufficient capacity to divert and carry, and for the purpose and with the intention of diverting and carrying, of the waters of the San Joaquin River flowing by said alleged place of diversion, five hundred (500) cubic feet of water per second, when so much water was flowing in the said San Joaquin River at said place of diversion, and with the intention of diverting, when less than five hundred (500) cubic feet of water per second was flowing in said San Joaquin River at said place, all the water which was so flowing in said river, for irrigation, sale, rental and distribution; and said cross-complainant continued the building and construction of said canal of said capacity and for said purpose and with the said intention, to its completion in the year 1888 for the distance of more than twenty (20) miles, and at an outlay and expense exceeding one hundred thousand dollars ($100,000).

18. That the said grantors and predecessors in interest of Miller & Lux, Incorporated, at all times had knowledge of the building of said canal and of the intention of said cross-complainant to divert water therein from said San Joaquin River, as aforesaid, and of the expenditure of said sum of money in the construction of said

125 canal and of the said claim of ownership of said water by said cross-complainant, and of the claim of right to divert said water by cross-complainant, and they acquiesced therein.

19. That in building the said canal and expending the money in the construction thereof, as aforesaid, the cross-complainant did so relying on the honest belief that it had the right to divert into its canal, when constructed, the said above mentioned quantity of water, and relied upon the acquiescence of said grantors and predecessors in interest of Miller & Lux, Incorporated, in the said claim of ownership of said water and the said right claimed by the said cross-complainant to divert water as aforesaid.

20. That said grantors and predecessors in interest of Miller & Lux, Incorporated, at all times well knew that the said cross-complainant was building and constructing said canal and expending

said money therein, in the honest belief that it would have the right when said canal was completed to divert therein the said quantity of water, and well knew that the said cross-complainant was building the said canal and expending the said money in reliance upon said acquiescence of said grantors and predecessors in interest of Miller & Lux, Incorporated, in said claim of cross-complainant to the ownership of said water and the right to divert the same, as aforesaid.

21. That immediately upon the completion of the construction of said canal, the said cross-complainant commenced the said diversion of the waters of the said San Joaquin River, so claimed as aforesaid, and has continued to divert the same from and including the year 1888 to the present time, and the waters so diverted have been used for the irrigation of land along the line and below the level of the water in said canal, and for watering live stock and for domestic purposes, and all of said waters, so diverted, have been used for beneficial purposes.

126 22. That at the same time that this cross-complainant dug and constructed said canal, as hereinabove stated, the said cross-complainant built a dam across the channel of said river immediately below the place where the said canal was cut through the bank of said river, which said dam has been at all times used for the purpose, and was necessary to divert water into said canal from said river whenever the flow of water in said river was at a comparatively low stage, and which said dam has at all times since the year 1888 been used to divert water into said canal from said river when five hundred (500) cubic feet of water per second would not run into said canal without said dam; and it is the intention of the cross-complainant to so use said dam in the future, and said dam will be necessary to divert said water in the future; that said dam is the dam mentioned and described in the amended bill of complainant of Miller & Lux, Incorporated, filed herein; that said dam is now, and ever since the year 1888 has been, built of brush, lumber, sand, dirt and logs, and has been annually repaired, and parts of it which were washed away by the high water which annually flows in said river have each year, after the said high water in said river subsided, been restored; and the said cross-complainant has continuously since the year 1888 maintained, repaired, renewed and restored the said dam openly, notoriously, peaceably, adversely, exclusively, uninterruptedly and under a claim of right, both as against Miller & Lux, Incorporated, and against the whole world, with the knowledge and acquiescence of said Miller & Lux, Incorporated, and its predecessors and grantors; and the cross-complainant, continuously since the year 1888, has taken and appropriated the waters of said San Joaquin River at the said place of diversion hereinbefore stated to the extent of five hundred cubic feet of water per second when that quantity of water was flowing in said San Joaquin River at

127 said place, and when less than that quantity of said water was flowing in said San Joaquin River at said place, then cross-complainant has continuously taken all the water at any such time flowing in said river at said place openly, notoriously, peaceably,

adversely, exclusively, uninterruptedly and under a claim of right as against Miller & Lux, Incorporated, and its predecessors and grantors and the whole world, with the full knowledge and acquiescence of the said Miller & Lux, Incorporated, and its grantors and predecessors; and said cross-complainant took and appropriated said water to furnish the same and for the purpose and with the intention of furnishing and supplying the same for beneficial purposes to the inhabitants of the lands situated along the line of and below the water in said canal, for the irrigation of said lands so situated, and for sale, rental and distribution by said cross-complainant to all persons needing and desiring to use the same; and pursuant to such intention the said cross-complainant immediately after appropriating and diverting said water, as aforesaid, commenced to furnish the same for sale, rental and distribution, and all thereof was so furnished and used for the purpose of irrigation, domestic uses and stock purposes upon said lands lying along the line of said canal and below the level of the water therein to all persons owning, occupying and using lands in said territory and within the flow of cross-complainant's said canal, who desire to receive and use the same; and said water and all thereof was used for the irrigation of said lands and in growing trees, alfalfa and in producing crops of grain, alfalfa, grapes, fruits and wild grasses on said lands, and said trees, vines and alfalfa are now standing and growing upon a large part of said lands so irrigated, and said
128 lands on which said water is being and has been used, as aforesaid, are naturally dry and unproductive, and without said water all such trees, vines and other crops and said grasses thereon will wither and dry and become wholly destroyed, and there is no other water sufficient and available or which could be appropriated for the irrigation thereof; and the said lands so irrigated by said water upon which crops have been made to grow and upon which crops can hereafter be made to grow, constitute and comprise an area of more than thirty thousand (30,000) acres of land.

23. That the said Miller & Lux, Incorporated, and its predecessors and grantors of all the lands owned by said Miller & Lux, Incorporated, at all times have well known that said waters so diverted by cross-complainant have been diverted and used by such persons taking and using the same for the purposes aforesaid, under a claim of right, openly, notoriously, continuously, adversely, peaceably and uninterruptedly during all the times herein mentioned, and neither the said grantors and predecessors of Miller & Lux, Incorporated, nor Miller & Lux, Incorporated, have ever in any manner at any time prior to the commencement of this suit protested, advised, suggested or intimated to the cross-complainant herein or to said or any of the users of said water that they disputed or intended at any time to deny or dispute the right of said cross-complainant or of said users of said water to appropriate and use the same, as aforesaid, and neither the said grantors and predecessors of Miller & Lux, Incorporated, nor said Miller & Lux, Incorporated, in any manner or way gave notice to said cross-complainant herein or to said users of said water, or any thereof, at any time prior to the commencement

of this suit, that they, or either of them, would require the said cross-complainant to desist from diverting the said water from said San Joaquin River, or that they, or either of them, would ever
129 claim or assert in any way that said water was not being taken by said cross-complainant under a claim of right, with good and valid title thereto.

24. That after the construction of said canal and said dam and the diversion of water therein, and the use and distribution of the water diverted therein, and the use and distribution of the water diverted into said canal, as aforesaid, and at the time said diversion, distribution and use were being made and had, the said grantor and predecessor of Miller & Lux, Incorporated, who had made the said agreement with cross-complainant, made and executed to said complainant on the 8th day of December, 1893, a deed of the right of way whereon the said canal had been constructed, in which said deed reference was made to said agreement of the month of August, 1887, and to the fact that the said canal had been constructed, and to the fact that said canal was then carrying water for irrigation and other purposes; and by said deed the right was granted to cross-complainant to enter upon the said right of way to the extent that such entry was necessary to maintain and repair and keep in good condition the said canal; and it was in said deed conditioned that said right of way therein granted should be held and enjoyed by the cross-complainant, its successors and assigns, so long as the canal is used for carrying water therein for the purposes of the cross-complainant; and in consideration of said deed of said right of way and right to enter, the said cross-complainant, in and by the terms of said deed, granted and conveyed to said predecessors of said Miller & Lux, Incorporated, their heirs and assigns, fifty (50) cubic feet of water per second of the water which should be at any time flowing in said canal, so long as there was not less than two hundred (200) cubic feet of water per second so flowing, and one-fifth (1/5) of
130 the quantity at any time flowing in said canal when there was less than two hundred (200) cubic feet of water per second and more than one hundred (100) cubic feet of water per second flowing in said canal, and stock water and water for domestic purposes when less than one hundred (100) cubic feet of water per second was flowing in said canal; and it was further provided in said deed that the right of way therein granted and the delivery of the water to the said predecessors of Miller & Lux, Incorporated, their successors and assigns, were conditions dependent one upon the other, and that the right of way, with the right to enter and said right to said water shall run with the land; and it was further provided in said deed that the water to which the said predecessors of Miller & Lux, Incorporated, were entitled under the provisions of said deed should be used on the lands then owned by said predecessors and upon the lands afterwards to be acquired by said predecessors; and it was further provided in said deed that said right of way should be held and enjoyed by the said cross-complainant and its successors and assigns so long as the said canal was used for carrying water therein for the purposes of said cross-complainant; that

the said deed was drawn by the attorney for and at the instance and request of the said predecessors of Miller & Lux, Incorporated; and at the time of the execution of said deed by said parties thereto it was well known to the said predecessors of said Miller & Lux, Incorporated, that the cross-complainant believed that said deed would be construed to and that said deed did provide and recognize and admit the ownership of said cross-complainant to said quantity of five hundred (500) cubic feet of water per second of the flow of water in the said San Joaquin River at said place of diversion, and the right of said cross-complainant to divert the same from the said San Joaquin River; and said contract and deed with cross-complainant were based upon such fact as an admitted fact.

131 25. That the value of said canal would be destroyed and said canal rendered useless and valueless if the cross-complainant is prevented from diverting said water so by it diverted from the said San Joaquin River.

26. That from the time of the diversion of said water, as aforesaid, by cross-complainant many of the owners of land and persons occupying lands along the line of said canal and within the flow of the water of said canal, honestly believing that said cross-complainant had good title to said water and good right to appropriate the same, and relying upon the aforesaid acts and conduct of the said grantors and predecessors in interest of Miller & Lux, Incorporated, in and to the lands described in the amended bill of complaint of Miller & Lux, Incorporated, proceeded to and did purchase, rent, take and use said water upon the said lands along the line of said canal and under its flow; and upon the faith of the continuance of the use of said water, and in the belief that the said right and use *of said water, and in the belief that the said right and use* would be continuous, and relying upon the acquiescence, conduct and acts of Miller & Lux, Incorporated, and its said grantors and predecessors in interest, as aforesaid, did proceed to plant said lands in trees, vines, alfalfa and other crops and grasses requiring irrigation, at very great expense, so that many thousands of dollars had been expended therein at the time of the commencement of this suit, by persons taking and using water from said cross-complainant upon the said lands along the line of the canal of said cross-complainant and under its flow, all of which will be lost and destroyed if the cross-complainant shall be prevented or enjoined from diverting the said water from said San Joaquin River.

132 27. That the said investments were made and said property improved, and said vines, orchards and alfalfa were planted and irrigated, and the money necessary therefor expended, in good faith by said persons, in reliance upon the conduct aforesaid of the said Miller & Lux, Incorporated, and its said grantors and predecessors, and upon the honest belief on the part of said persons that they and the cross-complainant herein had good right to use the same, and in reliance upon the aforesaid conduct and acts of Miller & Lux, Incorporated, and of its said grantors and predecessors aforesaid, and in reliance by said persons, and each of them, as well as this cross-complainant, that said Miller & Lux, Incorporated, would

never claim or assert any right contrary to the said claim to the said water made by said cross-complainant.

28. That the cross-complainant, after the diversion of said water and after the execution of said contract and deed, made and entered into contracts with said persons occupying and owning lands along the line and under the flow of water of said canal, for the sale and furnishing of water, on the faith of said acts and conduct of said Miller & Lux, Incorporated, and its grantors and predecessors, as aforesaid, and in the belief that no title or right of said Miller & Lux, Incorporated, would be asserted to prevent said diversion of said water, and which said contracts, so made by said cross-complainant and said persons, could not be performed by said cross-complainant if a judgment of the Court were pronounced enjoining cross-complainant from diverting said water from said San Joaquin River, or if the said Miller & Lux, Incorporated does any act or thing which will prevent the said water of said San Joaquin River flowing into said canal.

29. That all the acts and omissions herein alleged of the grantors and predecessors in interest of Miller & Lux, Incorporated, were at all times well known to said Miller & Lux, Incorporated.

133 30. That all of the lands situated below the flow of water in said cross-complainant's canal, and which can be irrigated therefrom, are adapted to irrigation, and by irrigation larger and more profitable crops can be grown upon said lands and more people sustained thereon than can be without irrigation of said lands; and said lands constitute and are a farming neighborhood; and all of said water so diverted is necessary for the irrigation of said lands along the line and under the flow of said water in said canal.

31. That said water was so appropriated by cross-complainant for use, and all thereof has at all times been continuously and is now used for beneficial purposes, to-wit, for the irrigation of lands, watering of stock and domestic purposes.

32. That each and all the matters and things, including the appropriation of said water by cross-complainant in the manner aforesaid, the construction and completion of said system of canals for the diversion and distribution of said water, the diverting and taking of said water from said river and the use thereof by said persons upon said lands lying along the line of said canal and under the flow thereof, and the planting and growing of said orchards, vineyards, alfalfa and other grasses upon said lands, have been continuous for five years prior to the commencement of this suit.

33. That ever since the completion of said canal by said cross-complainant, the grantors and predecessors of Miller & Lux, Incorporated, and Miller & Lux, Incorporated, since its incorporation, have claimed the right, under and by virtue of and through said contract with the cross-complainant, and said deed made with the cross-complainant, to have furnished to it and them by cross-complainant, and during said time there has been furnished and delivered to it and them by cross-complainant pursuant to said deed and

134 contract, from said cross-complainant's canal, of the water diverted into said canal from said river, fifty (50) cubic feet

of water per second, when there was flowing in said canal two hundred (200) or more cubic feet of water per second, and when there was less than two hundred (200) cubic feet of water per second and not less than one hundred (100) cubic feet of water per second flowing in cross-complainant's said canal, then Miller & Lux, Incorporated, and its said grantors and predecessors in interest, as aforesaid, have claimed the right to have diverted and furnished to it and to them by cross-complainant one-fifth (1/5) thereof; and when there was less than one hundred (100) cubic feet of water per second flowing in said canal, Miller & Lux, Incorporated, and its said grantors and predeces-ors have claimed the right to have delivered and furnished to *to* it and them from the waters flowing in said canal sufficient thereof for the watering of all live stock and for domestic purposes.

34. That after the making of said agreement between said cross-complainant and said predecessors of Miller & Lux, Incorporated, as aforesaid, in August, 1887, and after the making of said deed, the said cross-complainant ever since it commenced diverting said water, as aforesaid, furnished and delivered, as agreed in said contract and deed, to said Miller & Lux, Incorporated, and its said grantors and predecessors, and said Miller & Lux, Incorporated, and its said grantors and predecessors received and used, the said quantity of water in said contract and deed agreed to be delivered and furnished to said Miller & Lux, Incorporated, and to its said grantors and predecessors.

35. That the quantity of water which has flowed in said San Joaquin River channel every year heretofore has varied at different seasons of the year; that the maximum flow therein each year has approximated twenty thousand (20,000) cubic feet per second, and the minimum flow in ordinary years has approximated four
135 hundred (400) cubic feet per second, measured at the place on said river where the said river first enters at its highest point upon the lands now owned by said Miller & Lux, Incorporated, which place of measurement is above the place where the said cross-complainant has at all times, as hereinabove stated, maintained its dam and diverted water from said river; and said place where said river channel in its course first enters the land of Miller & Lux, Incorporated, as hereinbefore described, is hereinafter designated as "the said place of measurement."

36. That below said place of measurement, on both sides of the San Joaquin River, Miller & Lux, Incorporated, is the owner, and it and its predecessors in interest and title have been the owners, of certain lands which border upon and constitute part of the banks of said San Joaquin River; and below said place of measurement, on both sides of the said San Joaquin River, there are many thousand acres of land fronting for many miles on said river channel, not now owned by, and which were never owned by, said Miller & Lux, a corporation, or by said Miller & Lux, a copartnership, and which said lands border upon and constitute a part of the banks of said San Joaquin River, and all of said lands are riparian to said river.

37. That more than two-thirds (⅔) of all of the lands owned by Miller & Lux, Incorporated, which border upon and constitute part

of the banks of said river are situated upon the banks of the said river below the place on said river where the said cross-complainant has diverted, and now diverts, its water, as hereinabove mentioned.

38. That of the water which may at any time be flowing in said river at said place of measurement hereinbefore specified, at least two hundred (200) cubic feet per second are necessary, and
136 at all times heretofore have been necessary, to supply all the said riparian owners of lands along the banks of said San Joaquin River for use on said riparian lands below the place of said measurement with water sufficient for the requirements of livestock pasturing on said riparian lands, and for domestic purposes; and more than one hundred (100) cubic feet of water per second thereof was, prior to the time of appropriation and distribution of water by cross-complainant, as hereinbefore stated, necessary to supply the owners of said riparian lands for use on riparian lands below said place where cross-complainant diverts, and has at all times diverted, water from said river, as hereinbefore stated, with water sufficient for livestock pasturing on said riparian lands so situated below said cross-complainant's place of diversion, and for domestic purposes thereon.

39. That of the water in said river flowing at any time at said place of measurement, after deducting therefrom the said two hundred (200) cubic feet of water per second necessary for livestock and domestic purposes, as aforesaid, said Miller & Lux, Incorporated, and its predecessors in interest, prior to the time of the appropriation and diversion of the water by cross-complainant, as hereinbefore stated, were entitled to receive and use a reasonable and just proportion for the irrigation of their riparian lands; and said reasonable and just proportion did not exceed one-tenth (1/10) of said water so at any time flowing at said place of measurement in excess of said two hundred (200) cubic feet of water per second, and which said one-tenth (1/10) of said quantity of water so at any time flowing at said place of measurement in excess of two hundred (200) cubic feet of water per second, prior to the appropriation and diversion of water by cross-complainant, as hereinbefore stated, included all the rights of Miller & Lux, Incorporated, and all the rights heretofore held and owned by said Miller & Lux, a corporation and by said Miller & Lux, a copartnership, to use water for the irrigation of lands bordering upon the said San Joaquin
137 River, both below and above the said place where the cross-complainant diverts, and at all times heretofore has diverted, its water, as hereinbefore stated.

40. That of the quantities of land bordering upon the said San Joaquin River, below the said place of measurement, the said Miller & Lux, Incorporated, does not own, nor did said Miller & Lux, a copartnership, nor did said Miller & Lux, a corporation, at any time own to exceed one-tenth (1/10) thereof.

41. That all of the lands below said place of measurement, which are riparian to said San Joaquin River, are, and at all times have been, equally susceptible and adaptable to irrigation from the waters of said San Joaquin River, and the same benefits would be,

and at all times would have been, derived from all parts of said riparian lands from the use of the waters of said river thereon for irrigation.

42. That all parts of said riparian lands below said place of measurement, would require, and at all times when the same have been irrigated did require, practically acre for acre, the same quantity of water to be used for the irrigation thereof, and each owner of said riparian land upon the banks of said San Joaquin River was, prior to the time of the diversion of water by cross-complainant, as hereinbefore stated, entitled to the use of, and had the right to use for the irrigation of his said riparian land, such part of the water at any time flowing in said San Joaquin River, at said place of measurement, as the number of acres of such riparian land owned by such owner bore to the whole number of acres of the said riparian lands bordering upon said San Joaquin River below said place of measurement.

43. That at least nine-tenths (9/10) of said riparian lands below said place of measurement are situated on said San Joaquin River below the place where the cross-complainant diverts, and has at all times diverted, water, as hereinbefore stated.

138 44. That the San Joaquin & Kings River Canal & Irrigation Company is now a corporation organized and existing under the laws of the State of California, and that said corporation was organized at some time prior to the year 1875.

45. That the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, is now, and at all times since about the middle of the year 1905 has been, a corporation organized, existing and acting under the laws of the State of Nevada; and that cross-complainant is informed and believes, and upon such information and belief alleges the fact to be, that all of the capital stock of said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, is held and owned by the said San Joaquin & Kings River Canal & Irrigation Company.

46. That Miller & Lux, a corporation, is a corporation organized, existing and acting under the laws of the State of California, and was so incorporated on or about the 5th day of May, 1897.

47. That Henry Miller and Charles Lux were members of a copartnership doing business under the firm name and style of Miller & Lux from the time prior to the year 1870 down to and including the 15th day of March, 1887, when said Charles Lux died, and thereafter the property of said copartnership and management and liquidation of its business was in the hands and control of the surviving partner, Henry Miller to and until the said property was transferred to said corporation, Miller & Lux, a corporation, in the year 1897.

48. That said copartnership, Miller & Lux, at all times after the year 1890 to the time of its dissolution herein mentioned, owned more than fifty-one per cent. (51%) of the capital stock of said San Joaquin & Kings River Canal & Irrigation Company, and elected and controlled the Board of Directors of said San Joaquin & Kings

River Canal & Irrigation Company; and after the dissolution
139 of said copartnership and prior to the organization of said Miller & Lux, a corporation, Henry Miller, the surviving partner of said copartnership, as such, owned more than fifty-one per cent. (51%) of the capital stock of said San Joaquin & Kings River Canal & Irrigation Company, and elected and controlled the Board of Directors of said San Joaquin & Kings River Canal & Irrigation Company; and said Henry Miller is now, and ever since the year 1890 has been, the President and Manager of said San Joaquin & Kings River Canal & Irrigation Company, and of said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, and of said Miller & Lux, a corporation, and of said Miller & Lux, Incorporated; and said Henry Miller has had charge of and directed the diversion of water from said San Joaquin River by said San Joaquin & Kings River Canal & Irrigation Company, and by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated.

49. That Miller & Lux, a corporation, was organized under the laws of the State of California, for the purpose, among other purposes, of liquidating said copartnership of Miller & Lux and for the purpose of distributing the assets of Miller & Lux, a copartnership, to the persons entitled thereto; and all the land and property of said copartnership, was transferred and conveyed to Miller & Lux, a corporation, including the riparian lands mentioned herein as being owned by Miller & Lux, Incorporated, in consideration of which said transfer of said property by the persons interested therein, all of the capital stock of said corporation, Miller & Lux, was transferred to said persons; that is, to each of said persons in the same proportion as each person was theretofore interested in the property of said copartnership.

140 50. That said Miller & Lux, a corporation, organized under the laws of the State of California, has been at all times since the organization of Miller & Lux, Incorporated, the owner of all of the capital stock of said Miller & Lux, Incorporated.

51. That said Miller & Lux, a corporation, organized under the laws of the State of California, has been at all times since said transfer to said corporation aforesaid, and until the transfer thereof to Miller & Lux, Incorporated, hereinafter mentioned, the owner of all of the capital stock of said San Joaquin & Kings River Canal & Irrigation Company, which said partnership of Miller & Lux had theretofore owned.

52. That after the organization of Miller & Lux, Incorporated, in the year 1905, the said Miller & Lux, a corporation, transferred and conveyed to said Miller & Lux, Incorporated, all of the capital stock of said San Joaquin & Kings River Canal & Irrigation Company, which said copartnership of Miller & Lux had theretofore owned; and during the time aforesaid, when Miller & Lux, a corporation, owned said stock of said San Joaquin & Kings River Canal & Irrigation Company, it elected and controlled the Board of Directors of said San Joaquin & Kings River Canal & Irrigation Company, and at all times since has, through the said corporation, Miller & Lux, elected and controlled the Board of Directors of said San

Joaquin & Kings River Canal & Irrigation Company, and of said San Joaquin & Kings River Canal & Irrigation Company, Incorporated.

53. That the number of directors of said San Joaquin & Kings River Canal & Irrigation Company is, and at all times has been, seven.

54. That the number of directors of said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, is, and at all times has been, seven.

141 55. That five of the persons who were directors of Miller & Lux, a corporation, are, were and at all times have been directors of said San Joaquin & Kings River Canal & Irrigation Company, and of said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, and of said Miller & Lux, Incorporated.

56. That Miller & Lux, a corporation, since its organization, has at all times directed the business, policy and acts of every nature and character of said San Joaquin & Kings River Canal & Irrigation Company, and of said San Joaquin & Kings River Canal & Irrigation Company, Incorporated; and has during said times directed and dictated all contracts made, and determined the character of all acts of said San Joaquin & Kings River Canal & Irrigation Company, and of said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, including the time, place, manner, character and purpose of all diversions of water from said San Joaquin River and the use thereof.

57. That from the year 1890 to the time of the transfer of said capital stock of said San Joaquin & Kings River Canal & Irrigation Company to Miller & Lux, a corporation, the said copartnership, Miller & Lux, and said Henry Miller, as the surviving partner of said copartnership, at all times directed the business, policy and acts of every nature and character of said San Joaquin & Kings River Canal & Irrigation Company, and during said time directed and dictated all contracts made, and determined the character of all acts of said San Joaquin & Kings River Canal & Irrigation Company, including the time, place, manner and character and purpose of all diversions of water from said San Joaquin River and the use thereof.

142 58. That the business of said corporation, Miller & Lux, a corporation; Miller & Lux, Incorporated; the San Joaquin & Kings River Canal & Irrigation Company, and the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, is conducted, and at all times has been conducted, in the same offices and by the same subordinate officers and agents.

59. That said Miller & Lux, Incorporated, was organized as a corporation in the State of Nevada as an agent of Miller & Lux, a corporation, and said Miller & Lux, Incorporated, has no existence except as a mere agency of Miller & Lux, a corporation; and all property held by said Miller & Lux, Incorporated, is as such agent; and said Miller & Lux, Incorporated, does not transact any business or do any act or thing other than such as may be necessary to carry out the purposes of Miller & Lux, a corporation organized under the

laws of the State of California, and to continue the liquidation of the business of Miller & Lux, a copartnership, and the distribution of the assets of said co-partnership to the persons entitled thereto.

60. That the said copartnership of Miller & Lux was the owner of all the riparian lands now owned by said Miller & Lux, Incorporated.

61. That the said Miller & Lux, a copartnership, while it was the owner of all the riparian lands herein mentioned, and said Henry Miller, as said surviving partner, gave permission to the said San Joaquin & Kings River Canal & Irrigation Company to divert from said San Joaquin River certain of the waters thereof into a ditch and canal which had theretofore been constructed for that purpose, and to use the same for the irrigation of the lands of Miller & Lux, a copartnership, and other lands.

62. That pursuant to said permission the said San Joaquin & Kings River Canal & Irrigation Company did divert from
143 said San Joaquin River, prior to the year 1890, not to exceed four hundred and sixty-two (462) cubic feet of water per second, and after the year 1890, did, by virtue of said permission of said Miller & Lux, a copartnership, and by permission of Miller & Lux, a corporation, and by permission of Miller & Lux, Incorporated, continue to divert said quantity of water from said river; and the San Joaquin & Kings River Canal & Irrigation Company has since the year 1890, at divers times, increased its said diversion of water from said river, by permission of the said Miller & Lux, a copartnership, and of said Henry Miller, the surviving partner thereof, and of Miller & Lux, a corporation, and of Miller & Lux, Incorporated.

63. That the place where the said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, diverted said water is below said place of measurement and above all the sloughs hereinafter mentioned, and is also above the place where the cross-complainant has diverted water into its canal, as hereinafter stated.

64. That the said Miller & Lux, a corporation organized, existing and acting under the laws of the State of California, when it was the owner of all the riparian lands now owned by Miller & Lux, Incorporated, aforesaid, made and executed with the said San Joaquin & Kings River Canal & Irrigation Company that certain agreement in words and figures following:

"This agreement, made this 18th day of May, 1899, by and between The San Joaquin & Kings River Canal & Irrigation Company, a corporation organized and existing under the laws of the State of California, the party of the first part, and Miller & Lux, also a corporation organized and existing under the laws of said State, the party of the second part,

"Witnesseth: That, whereas, prior to the construction of
144 the canal of the party of the first part, Henry Miller and Charles Lux were the owners of lands lying along and bordering upon the San Joaquin River, and its sloughs, in said State, and lying above and below the head of the canal of the party of the

first part, and were the owners of riparian rights in and to the waters of said river and sloughs, and had been accustomed to and did actually use the waters of said river and sloughs which naturally overflowed said lands, and also to take water therefrom by artificial means, for the purpose of irrigating said lands and furnishing water for their cattle and livestock, and for other domestic uses, in accordance with their said riparian rights;

"And, whereas, said Henry Miller and Charles Lux, for the purpose of aiding the construction of said canal of the party of the first part, did pay to the party of the first part a subsidy in money, and conveyed to it a right of way for its said canal where the same passed through the lands of said Henry Miller and Charles Lux of a width of one hundred (100) feet on each side of the center line of said canal, and permitted the party of the first part to appropriate and divert from said river through said canal eight hundred (800) cubic feet per second of the water flowing in said river;

"And, whereas, at all times since said appropriation was made by the party of the first part, said Henry Miller and Charles Lux, and said Henry Miller, as the survivor of them, and the party of the second part (as the successor in interest of said Henry Miller and Charles Lux) continued, as said riparian owners, to use the overflow waters of said river and sloughs upon said lands for the aforesaid purposes, and also to use, for the purpose of irrigating uncultivated land, and furnishing water for their livestock and for other domestic uses, and with the consent of the party of the first part, and without any charge therefor by it, the surplus water running
145 in said canal not used or required by the water consumers of the party of the first part other than said Henry Miller, Charles Lux, and the party of the second part;

"And whereas, during all said times it was understood by all said parties that said Henry Miller and Charles Lux, and said Henry Miller, as the survivor of them, and said party of the second part, as the successor in interest of them, were of right entitled to the said use, without charge, of the said surplus water in said canal; and that said party of the first part was of right entitled to waste said surplus water on said uncultivated lands;

"And, whereas, the party of the second part has agreed to permit the party of the first part to appropriate and divert from said river, through its "Outside Canal," three hundred and fifty (350) cubic feet per second of the water flowing in said river, in addition to the aforesaid eight hundred (800) cubic feet per second;

"Now, therefore, in consideration of the premises, and to the end that the rights of the respective parties hereto, as heretofore understood and recognized, may be fixed and established, the party of the first part does hereby confirm unto said party of the second part the right to use, for the purposes of irrigating the said uncultivated lands above referred to, and of furnishing water for its cattle and livestock, and for other domestic uses, free of cost or charge to it, all or so much of the surplus water running in the canals of the party of the first part as the party of the second part may desire to use for said purposes, and which may not be used or required by the other

water consumers of the party of the first part; and said party of the second part does hereby confirm unto said party of the first part the right to waste said surplus water on said uncultivated land;

"And the party of the first part does hereby acknowledge
146 and declare that it has no claim to make against the party of the second part, or its predecessors in interest, on account of the use heretofore made by it and them of said surplus water.

"In witness whereof, the said parties hereto have caused these presents to be subscribed by their respective Presidents and Secretaries, under their respective corporate seals, all on the day and year first above written.

THE SAN JOAQUIN AND KINGS RIVER CANAL & IRRIGATION CO.,
By HENRY MILLER, *President*,
By C. Z. MERRITT, *Secretary*.
MILLER & LUX,
By HENRY MILLER, *President*,
By DAVID BROWN, *Secretary*."

65. That the said San Joaquin & Kings River Canal & Irrigation Company, and the said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, after said contract last above mentioned was made, continued to divert water from said river under the permission of Miller & Lux, a corporation, therein given.

66. That of the water at all times so diverted by said San Joaquin & Kings River Canal & Irrigation Company, and said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, at least one-fourth (¼) thereof has at all times been used to irrigate the said riparian lands of said Miller & Lux, a copartnership, and Miller & Lux, a corporation, and Miller & Lux, Incorporated, below the place where the said San Joaquin & Kings River Canal & Irriga-
147 tion Company and its successor, said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, have heretofore diverted said water from said river, as aforesaid, and above the place where the cross-complainant has diverted its water, as hereinbefore stated.

67. That the said riparian lands which have been so irrigated by the use of said water so diverted by said San Joaquin & Kings River Canal & Irrigation Company and its successor, said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, exceed two-thirds (2/3) of all the riparian lands owned by Miller & Lux, a copartnership; Miller & Lux, a corporation, and Miller & Lux, Incorporated, which are situated above the place of diversion by said cross-complainant, as hereinabove stated.

68. That the said San Joaquin & Kings River canal & Irrigation Company and its successor, said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, pursuant to said permission and said contract herein alleged diverted said four hundred and sixty-two (462) cubic feet of water per second from said San Joaquin River whenever there was flowing in said river in excess of five hundred and twenty (520) cubic feet of water per second at the

place where the said San Joaquin & Kings River Canal & Irrigation Company and its successor, said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, diverted its water from said river.

69. That said four hundred and sixty-two (462) cubic feet of water per second, so diverted by said San Joaquin & Kings River Canal & Irrigation Company and its successor, the said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, is, and at all times has been, when less than two thousand (2000) cubic feet of water per second was flowing in said channel of said San
148 Joaquin River at said place of measurement, more than the just and reasonable share of said water so flowing which Miller & Lux, Incorporated, is entitled to use, or which Miller & Lux, a corporation, was entitled to use, or which Miller & Lux, a copartnership, was entitled to use; and one-fourth (1/4) of said four hundred and sixty-two (462) cubic feet of water per second at said time and stage of water in said river is, and at all times has been, more than the just and reasonable share of water which Miller & Lux, Incorporated, is, or at any time has been, entitled to use, or which its predecessors, Miller & Lux, a corporation, or Miller & Lux, a copartnership, are, or at any time have been, entitled to use.

70. That said San Joaquin & Kings River Canal & Irrigation Company and its successor, the said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, pursuant to and under the said permission and said contract with Miller & Lux, a corporation, have, as the quantity of water flowing in said river increased, increased the quantity of water diverted by them; and they have at all times taken more water from said river, at whatever stage of water, than the just and reasonable share of the water flowing in said river which said Miller & Lux, Incorporated, was entitled to use, and more than Miller & Lux, a copartnership, or Miller & Lux, a corporation, was entitled to use.

71. That since the year 1890, the said San Joaquin & Kings River Canal & Irrigation Company and its successor, the said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, have, pursuant to and acting under the permission of Miller & Lux, Incorporated, and of said Miller & Lux, a copartnership, and of Miller & Lux, a corporation, and pursuant to and acting under the permission contained in said contract dated May 18, 1899, diverted
149 from said river at said place of diversion in excess of one-tenth (1/10) of all the water flowing in said river when the flow of said river was less than four thousand (4000) cubic feet of water per second; and said Miller & Lux, Incorporated, has at times, and the predecessors of Miller & Lux, Incorporated, have at times, since the year 1890, when the said quantity of water flowing in said river was less than four thousand (4000) cubic feet per second, taken, received and used more than one-tenth (1/10) of the flow of said river at such times, which water has been so used upon and for the irrigation of the riparian lands now owned by Miller & Lux, In-

corporated, above the said place where the cross-complainant is diverting and has at all times diverted water.

72. That the flow of water in said river varies; that is to say, when there are heavy rains and during the months of May, June, and to July the 15th of ordinary years when the snow is melting, the flow of water in the river is in excess of four thousand (4000) cubic feet of water per second; and during other seasons of the year, the flow of said water in said river is less than four thousand (4000) cubic feet per second; and from said times of maximum flow in each year, the flow of the water in said river gradually decreases until the minimum flow is reached during the months of September and October in each year.

73. That at no time prior to the year 1898 did there flow in the channel of said San Joaquin River at the place heretofore mentioned where the cross-complainant diverts water therefrom, less than one hundred (100) cubic feet of water per second.

74. That the diversion of water by the cross-complainant, as hereinbefore stated, was prior to the diversion of any water from said river by Miller & Lux, a copartnership, or by Miller & Lux, a corporation, or by Miller & Lux, Incorporated.

150 75. That the diversion of water by the cross-complainant, as hereinbefore stated, was prior to the diversion of any water from said river in excess of four hundred sixty-two (462) cubic feet per second by said San Joaquin & Kings River Canal & Irrigation Company, or its successor, said San Joaquin & Kings River Canal & Irrigation Company, Incorporated.

76. That in the natural state of said river channel, when the water flowing in said river channel was less than two hundred (200) cubic feet per second at the said place of measurement, all of said quantity of water would, if left unobstructed, flow in said channel to said dam of cross-complainant, and be diverted into the said canal of cross-complainant.

77. That there are certain natural branches of the main channel of said river alleged and described in the amended bill of complaint filed in this suit and in the supplemental bill of complaint herein; which natural branches include three sloughs known respectively as Deep Slough, Poso Slough and Temple Slough; and each of said sloughs and other natural branches of the main channel of said river is, and at all times has been, a water course which makes across a certain piece of land situated in one of the larger bends of the said San Joaquin River, and no part of the water which is discharged into said sloughs from said river is returned to the said river channel above the said place where the said cross-complainant diverts water from the said river; but all of said water, so discharged into said sloughs, returns to the river channel below the place where the said cross-complainant diverts water from the said river, as hereinbefore stated; that said Deep Slough, Poso Slough and Temple Slough and said other natural branches of the main channel of said river, each, at its proper end, connects, and at all times has connected, with the

said San Joaquin River above the said place on said river
151 where the said cross-complainant diverts, and where it has, as hereinabove stated, diverted, the water from said river channel; and the course of each of said Sloughs follows generally the course of the said San Joaquin River until each of said sloughs connects at its lower end with the main channel of said San Joaquin River below the place where the cross-complainant diverts, and where it has, as hereinbefore stated, diverted, water from the said San Joaquin River; that the water which has flowed from said San Joaquin River into the said sloughs and other natural branches of the main channel of said river, at the upper end of each of said sloughs and the other natural branches of the main channel of said river, has at all times passed in each of said sloughs and other natural branches of the main channel of said river, around the said dam and head-gate of the cross-complainant at the place where said cross-complainant diverts, and has at all times diverted, water from the said San Joaquin River, as hereinbefore stated; and said water in each of said sloughs and in said other natural branches of the main channel of said river is, and at all times has been, discharged back into the channel of said river below the place where the cross-complainant is diverting, and has at all times heretofore diverted, water from said river channel, as hereinbefore stated; and all water which is permitted or caused to flow into the head of said sloughs will hereafter flow in the same manner and in the same course that the same has heretofore flowed; and when water has been, or whenever the same is hereafter, discharged from said river into the upper end of said sloughs and natural branches of the main channel of said river, or either of them, such water so discharged from said river cannot be made to flow into the ditch and canal of cross-complainant hereinbefore mentioned.

152 79. That all of the lands described in Schedule A, attached to the amended bill of complaint in this suit, are below the places where said sloughs and other natural branches of the main channel of said river above described discharge their waters into the said river channel.

79. That the said Miller & Lux, Incorporated, in order to increase the scouring of the water on the bottom on said Deep Slough and at the head of said Deep Slough, has within the last five years, and particularly during the years 1904 and 1905, cut away and removed the banks and lowered the bottom of said Deep Slough near the head of said Deep Slough, and cut away and removed certain brush which had theretofore at all times grown upon the banks of said Deep Slough and which had theretofore impeded the flow of water in said Deep Slough; and the said cutting away and lowering of the bottom of said Deep Slough, and the cutting out and removing of said brush did increase the flow of the water in said Deep Slough and the current thereof, so that water would thereafter run into said Deep Slough at stages of the river when theretofore water would not run into said Deep Slough, and so that when water would run into said Deep Slough from said river in the natural condition of said Deep

Slough and said river, a greater quantity of water would run into said Deep Slough than had theretofore run into said Deep Slough from said river; that cross-complainant is informed and believes, and upon such information and belief alleges the fact to be, that said Miller & Lux, Incorporated, and its said predecessors removed about eight (8) inches in depth of earth from the bottom of said Deep Slough at the highest place in the bottom of said Deep Slough, so that there would flow through said slough a depth of eight (8) inches more water than had theretofore flowed naturally through said slough.

153 80. That in the natural condition of said Temple Slough the bottom of said Temple Slough at the head of said Temple Slough was more than three (3) feet eight (8) inches above the bottom of the San Joaquin River channel immediately opposite the head of said Temple Slough, and no water whatever would flow into said Temple Slough until there was flowing in said San Joaquin River, opposite the head of said Temple Slough, more than three (3) feet eight (8) inches in depth of water; and in the natural condition of said Temple Slough no water whatever would run into said Temple Slough until there was flowing in said San Joaquin River, opposite the head of said Temple Slough, more than four hundred (400) cubic feet of water per second; and in the natural condition of said Temple Slough, after the water in said river was of sufficient depth to flow into said Temple Slough, not more than one-thirtieth (1/30) of the water flowing in said river opposite the head of said slough above the elevation of the bottom of said slough would flow into said Temple Slough before the changes therein made by Miller & Lux, Incorporated, as herein alleged; and said Temple Slough in its natural condition was less than fifteen feet wide at the head of said Temple Slough, and was of the same width for more than a mile below the head of said slough.

81. That said Miller & Lux, Incorporated, within the two years last past, dug away the banks and the bottom of said Temple Slough at the head of said Temple Slough and for a distance of several miles along the course of said Temple Slough, commencing at the head of said Temple Slough, so that the said Temple Slough was made more than fifty (50) feet wide at the head of said Temple Slough and so that the bottom of said Temple Slough at the head of said slough was made to be below the level of the

154 bottom of said river channel immediately opposite to the head of said Temple Slough, and so that the grade or fall of said Temple Slough from its head was increased; and the said increase in the grade or fall of said Temple Slough was such that with any depth of water at the head of said slough, twice as much water would flow into and through said Temple Slough as would have flowed into and through said Temple Slough before said grade and fall of said Temple Slough were changed by Miller & Lux, Incorporated.

82. That in the natural condition of said Poso Slough the bottom of said Poso Slough at the head of said Poso Slough was more than three (3) feet eight (8) inches above the bottom of the San Joaquin

River channel immediately opposite the head of said Poso Slough, and no water whatever would flow into said Poso Slough until there was flowing in said San Joaquin River, opposite the head of said Poso Slough, more than three (3) feet eight (8) inches in depth of water; and in the natural condition of said Poso Slough no water whatever would run into said Poso Slough until there was flowing in said Joaquin River, opposite the head of said Poso Slough more than four hundred (400) cubic feet of water per second; and in the natural condition of said Poso Slough, after the water in said river was of sufficient depth to flow into said Poso Slough, not more than one-thirtieth (1-30) of the water flowing in said river opposite the head of said slough above the elevation of the bottom of said slough would flow into said Poso Slough before the changes therein made by Miller & Lux, Incorporated, as herein alleged; and said Poso Slough in its natural condition was less than fifteen (15) feet wide at the head of said Poso Slough, and was of the same width for more than a mile below the head of said slough.

155 83. That said Miller & Lux, Incorporated, within the two years last past, dug away the banks and the bottom of said Poso Slough at the head of said Poso Slough and for a distance of several miles along the course of said Poso Slough, commencing at the head of said Poso Slough, so that the said Poso Slough was made more than fifty (50) feet wide at the head of said Poso Slough, and so that the bottom of said Poso Slough at the head of said slough was made to be below the level of the bottom of said river channel immediately opposite to the head of said Poso Slough, and so that the grade and fall of said Poso Slough from its head was increased; and the said increase in the grade or fall of said Poso Slough was such that with any depth of water at the head of said slough, twice as much water would flow into and through said Poso Slough as would have flowed into and through said Poso Slough before said grade and fall of said Poso Slough were changed by Miller & Lux, Incorporated.

84. That none of said natural branches of said main channel of said San Joaquin River, in their natural condition, will receive or draw water from said San Joaquin River until more than four hundred (400) cubic feet of water per second is flowing in said river opposite to the head of said natural branches.

85. That said Miller & Lux, Incorporated, has diverted water into said Deep Slough, Temple Slough and Poso Slough which would not run therein naturally, and have diverted water into said sloughs at times and stages of the water in said river when no water would run into said sloughs in their natural condition; and has diverted said water into said sloughs at a time when said Miller & Lux, Incorporated, and its predecessors, Miller & Lux, a corporation,

156 were taking, diverting and using for the irrigation of their said riparian lands more water than was the just and reasonable proportion of said water of said river which Miller & Lux, Incorporated, or its predecessors, was entitled to use, and at a time when there was not flowing in said San Joaquin River at the place where the cross-complainant diverts water into its canal, the

quantity of water which cross-complainant was entitled to divert.

86. That repeatedly, and on many different occasions, varying in duration from a day to a week and more, within the two years last past, when there was not flowing in said River at Cross-complainant's said place of diversion five hundred (500) cubic feet of water per second and at times when there was not flowing in said river at Cross-complainant's said place of diversion seventy (70) cubic feet of water per second, caused by and because of the acts of the said Miller & Lux, Incorporated, and its said predecessors as in this paragraph hereinafter alleged, the said Miller & Lux, Incorporated, and its said predecessor, well knowing the premises, and intending to injure the Cross-complainant, and intending to prevent the Cross-complainant from receiving the quantity of water which the said Cross-complainant was entitled to divert, and intending to prevent the flow of water in said San Joaquin River to the Cross-complainant's said Canal, did, above the said place, where Cross-complainant diverted water, as aforesaid, wrongfully permit water to flow and diverted water into said Sloughs from said River, and obstructed the flow of water in said River and diverted water from said River, which said water the Cross-complainant was entitled to have flow down to, through and into Cross-complainant's said Canal,
157 and at such times the said water so diverted and so permitted to flow into said sloughs, with the other diversions of water made, used and consumed by said Miller & Lux, Incorporated, to irrigate its said riparian lands above the place where Cross-complainant diverts water, as aforesaid, exceeded the quantity of water which Miller & Lux, Incorporated, was entitled to use from said River, and exceeded nine-tenths (9/10) of all the water then flowing in said San Joaquin River at said place of measurement, after deducting from the quantity of water flowing at said place of measurement the quantity of water which was at the same time being diverted by said San Joaquin & Kings River Canal & Irrigation Company, and its said successor, San Joaquin & Kings River Canal & Irrigation Company, Incorporated; and the said Miller & Lux, Incorporated, claims that it has the right to continue to do, and has had the right to do, and was acting within its rights in doing, each and all of the things in this paragraph alleged, and threatens to continue to do the acts and things herein alleged.

87. That repeatedly and on many different occasions, varying in duration from a day to a week or more, within the two years last past, when there was not flowing in said River at Cross-complainant's said place of diversion five hundred (500) cubic feet of water per second, and at times when there was not flowing in said River at said Cross-complainant's place of diversion seventy (70) cubic feet of water, caused by and because of the acts of the said Miller & Lux, Incorporated, as in this paragraph hereinafter alleged, the said Miller & Lux, Incorporated, well knowing the premises, and intending to injure the Cross-complainant, and intending to pre-
158 vent the Cross-complainant from receiving the quantity of water which the said Cross-complainant was entitled to divert, and intending to prevent the flow of water in said San Joaquin

River to the Cross-complainant's said Canal, did, above the said place where Cross-complainant diverted water, as aforesaid, wrongfully permit water to flow and diverted water into said Sloughs from said river, and obstructed the flow of water in said river and diverted water from said river, which said water the cross-complainant was entitled to have flow down to and into cross-complainant's said canal, and at such times the said water so diverted and so permitted to flow into said sloughs, with the other diversion of said water made and consumed by said Miller & Lux, Incorporated, to irrigate its said riparian lands above the place where cross-complainant diverts water as aforesaid, exceeded the quantity of water which Miller & Lux, Incorporated, was entitled to use from said River and exceeded four-fifths (4/5) of all the water then flowing in said San Joaquin River at said place of measurement; and the said Miller & Lux, Incorporated, claims that it has the right to continue to do, and has had the right to do and was acting within its rights when doing, each and all of the things in this paragraph alleged, and threatens to continue to do the acts and things herein alleged.

88. That repeatedly and on many occasions, varying in duration from a day to a week or more, within the two years last past, when there was not flowing in said river, at cross-complainant's said place of diversion, five hundred (500) cubic feet of water per second, and at times when there was not flowing in said river at said cross-
159 complainant's place of diversion seventy (70) feet of water, caused by and because of the acts of the said Miller & Lux, Incorporated, as in this paragraph hereinafter alleged, the said Miller & Lux, Incorporated, well knowing the premises, and intending to injure the cross-complainant, and intending to prevent the cross-complainant from receiving the quantity of water which said cross-complainant was entitled to divert, and intending to prevent the flow of water in said San Joaquin River, to the cross-complainant's said canal, did, above the said place where cross-complainant diverted water, as aforesaid, wrongfully permit and consent, as hereinbefore alleged, to the diversion of water by said San Joaquin and Kings River Canal & Irrigation Company, Incorporated, and did, through the control of said Miller & Lux, Incorporated, exercise and has exercised over said two last named corporations, as hereinbefore stated, wrongfully caused the said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, and its predecessor, the said San Joaquin & Kings River Canal & Irrigation Company, to divert water in excess of four hundred and sixty-two (462) cubic feet per second, which said excess of water, so diverted and caused to be diverted, as stated in this paragraph, exceeded the quantity of water which said Miller & Lux, Incorporated, was entitled to use from said river, and exceeded four-fifths (4/5) of all the water then flowing in said San Joaquin River at said place of measurement, after deducting therefrom four hundred and sixty-two (462) cubic feet of water per second; and the said Miller & Lux, Incorporated, claims that it has a right to continue to do, and has had a right to do and was acting within its rights in doing, each and all of the things in this para-

graph alleged, and threatens to continue to do the acts and things herein alleged.

160 89. That repeatedly and on many occasions, varying in duration from a day to a week or more, within the two years last past, when there was not flowing in said river at cross-complainant's said place of diversion five hundred (500) cubic feet of water per second and at times when there was not flowing in said river at said cross-complainant's place of diversion seventy (70) cubic feet of water per second, caused by and because of the acts of the said Miller & Lux, Incorporated, as in this paragraph hereinafter alleged, the said Miller & Lux, Incorporated, well knowing the premises, and intending to injure the cross-complainant, and intending to prevent the cross-complainant from receiving the quantity of water which the said cross-complainant was entitled to divert, and intending to prevent the flow of water in said San Joaquin River to the cross-complainant's said canal, did, above the said place where cross-complainant diverted water, as aforesaid, wrongfully permit and consent to the diversion of water by said San Joaquin and Kings River Canal & Irrigation Company, and its successor, said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, and through the control said Miller & Lux, Incorporated, exercises and exercised over said corporations, as herein stated, caused the said corporations to divert water from said River in excess of the quantity of water which Miller & Lux, Incorporated, or its predecessor, was entitled to use, and in excess of four-fifths (4/5) of the water then flowing at said place of measurement; and the said Miller & Lux, Incorporated, claims that it has a right to continue to do, and has had a right to do, and was acting within its rights in doing, each and all of the things in this paragraph alleged, and threatens to continue to do the acts and things herein alleged.

161 90. That repeatedly and on many occasions, varying in duration from a day to a week or more, within the two years last past, when there was not flowing in said river at cross-complainant's said place of diversion five hundred (500) cubic feet of water per second, and at times when there was not flowing in said river at said cross-complainant's place of diversion seventy (70) cubic feet of water per second, caused by and because of the acts of the said Miller & Lux, Incorporated, as in this paragraph hereinafter alleged, the said Miller & Lux Incorporated, well knowing the premises, and intending to injure the cross-complainant, and intending to prevent the cross-complain-t from receiving the quantity of water which the said cross-complainant was entitled to divert, and intending to prevent the flow of water in said San Joaquin River to the cross-complainant's said canal, did, above the said place where cross-complain-t diverts water, as aforesaid, permit, consent and cause the said San Joaquin & Rings River Canal & Irrigation Company, Incorporated, to divert water, as hereinbefore alleged, which said water, with the water diverted at the same time and used by said Miller & Lux, Incorporated, to irrigate its riparian lands above the place where said cross-complainant diverts water as aforesaid, exceeded nine-tenths (9/10) of all the water in said San Joaquin River at said place of measure-

ment; and the said Miller & Lux, Incorporated, claims that it has the right to continue to do, and has had the right to do, and was acting within its right in doing, each and all of the things in this paragraph alleged, and threatens to do the acts and things herein alleged.

162 91. That whenever the said water was being diverted, as stated in either paragraph 86, 87, 88, 89 or 90 of this cross-complaint, the cross-complainant has built dams and obstructions in the head of said Temple Slough, Poso Slough and Deed Slough, so as to prevent, and which did prevent, the water from running from said river into said sloughs, until there was flowing in said river at said cross-complainant's place of diversion hereinbefore mentioned the quantity of water hereinbefore defined, which the cross-complainant was entitled to divert, and which said dams and other obstructions, are the dams and obstructions which it is alleged in the amended bill of complaint in this suit, the cross-complainant has built and maintained, and claims and asserts a right to build and maintain; that whenever said cross-complainant has within the last two years erected said dams and other obstructions to prevent the water from flowing in said sloughs, as aforesaid, the said Miller & Lux, Incorporated, and its said predecessor, Miller & Lux, a corporation, have, with an exhibition of force and violence, overpowered the agents of said cross-complainant in charge of said dams and other obstructions, and torn out and removed the same under such circumstances and with such a display of power, force and violence as led the cross-complainant to believe that a breach of peace would have occurred in case the cross-complainant insisted upon its rights to maintain said dams and other obstructions; and the said cross-complainant alleges on information and belief that if it had insisted upon its rights in the premises to maintain said dams and other obstructions, force would have been used by the said Miller &

163 Lux, Incorporated, and its said predecessor, Miller & Lux, a corporation, to prevent the maintenance of said dams and other obstructions, which would have led to a breach of the peace; and upon information and belief, the cross-complainant further says that said Miller & Lux, Incorporated, whenever said cross-complainant attempts to build and maintain said dams and other obstructions to prevent the water flowing in said sloughs, as aforesaid, will wrongfully tear out and remove the same, and if the said cross-complainant maintains the same, a breach of the peace will occur; that all said acts of said Miller & Lux, Incorporated, and its predecessor, Miller & Lux, a corporation in tearing out and removing said dams and other obstructions, so erected by said cross-complainant, were done by said Miller & Lux, Incorporated, and its said predecessor, Miller & Lux, a corporation, under the claim that it had a right to so do, and under claim that the said cross-complainant had no right to erect and maintain said dams, or to obstruct said sloughs, or to have, use and enjoy, in cross-complainant's canal, as aforesaid, the water which cross-complainant so prevented from running into said sloughs.

92. That at the time of the diversion of water, as aforesaid, by the said cross-complainant, the predecessors of Miller & Lux, Incorporated, and the said Miller & Lux, Incorporated, had no right to divert

the water of said San Joaquin River except such rights as were incidental to and a part of the said riparian lands owned by said predecessors of Miller & Lux, Incorporated, and said Miller & Lux, Incorporated; and they did not then divert and had not prior to that time, diverted any water from said San Joaquin River, except for
164 the purposes of irrigating said riparian lands, and no water had been diverted in excess of four hundred and sixty-two (462) cubic feet per second, by said San Joaquin and Kings River Canal & Irrigation Company, or its successor, said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, as hereinbefore stated; and excepting the right of said Miller & Lux, Incorporated, to divert and use water for the irrigation of the riparian lands of Miller & Lux, Incorporated, above the place where cross-complainant has diverted water, as herein stated, all rights of Miller & Lux, Incorporated, to divert and use water from said San Joaquin River above the said place where cross-complainant has diverted and used water as aforesaid, are subsequent, subordinate and subject to the rights of cross-complainant to divert and use water as hereinbefore alleged.

93. That said acts of Miller & Lux, Incorporated, in diverting said water from said river, and in causing the water of said river to flow down said sloughs so that a flow of five hundred (500) cubic feet of water per second was prevented from reaching the place where cross-complainant could divert the same into its canal when the cross-complainant is entitled thereto, as herein defined, has caused, and will, if said Miller & Lux, Incorporated, is not prohibited from wrongfully interfering with said water, or with any less flow of water to which the cross-complainant is entitled, as herein defined, cause great and irreparable damage to said cross-complainant, and said lands, heretofore irrigated from the said canal of cross-complainant, will not be supplied with sufficient water for their successful cultivation, and the crops planted upon said lands and the
165 trees, vines and alfalfa planted upon said lands will dry up and be destroyed and be rendered valueless, and the cattle pastured on the said lands will be deprived of water sufficient for their needs, and the cross-complainant will not receive the amount of water which it is entitled to receive, and it will be impossible to estimate the expense of the damage which cross-complainant will sustain in consequence of said acts of Miller & Lux, Incorporated; and great and irreparable injury and damage will be suffered therefrom by cross-complainant.

94. That the said Temple Slough, Poso Slough, and Deep Slough, if not restored to their natural condition will permit and cause water to flow into them which would not naturally flow therein, and will prevent the cross-complainant from receiving and taking at the cross-complainant's place of diversion of water, as aforesaid, the water to which cross-complainant is entitled, as herein defined, all of which will be to the great damage and injury of the cross complainant, and it will be impossible to estimate the extent of the damage which cross-complainant will sustain in consequence of said wrongful acts of said Miller & Lux, Incorporated, in changing the

natural condition of said slough ; and cross-complainant will suffer continuing, great and irreparable damage therefrom.

95. That the said wrongful acts of Miller & Lux Incorporated, in removing and tearing the said dams and other obstructions placed by cross-complainant in said sloughs, will prevent the water which cross-complainant is entitled to receive and take out at its said place of diversion, from flowing in said river at said place; and the said cross-complainant will be greatly damaged thereby, and it will be impossible to estimate the extent of such damage, and the cross-complainant will suffer continuing great and irreparable damage therefrom.

166 96. That adequate relief cannot be had in a court of law for the wrongs herein complained of.

And this cross-complainant alleges that all of the said acts, doings and things of the said Miller & Lux, Incorporated, are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises; in consideration whereof and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and can have relief only in a court of equity where matters of this nature are properly cognizable and relievable; to the end therefore that said cross-complainant may have that relief which it can *at*tain only in a court of equity, and that the said Miller & Lux, Incorporated, may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by this cross-complainant, and that said rights of the said Miller & Lux, Incorporated, to divert and use the water of said San Joaquin River above the place of diversion of cross-complainant, may be defined and decreed with reference to the rights of the cross-complainant, and also with reference to the water diverted by said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, by the consent and permission and under the control of the said Miller & Lux, Incorporated, and that the said Miller & Lux, Incorporated, be forever enjoined and restrained from diverting any water from the said river above the place where the said cross-complainant diverts the same, in excess of the rights of said Miller & Lux, Incorporated, so to be defined, which will in any way, manner or extent interfere with or impair the rights of the cross-complainant or obstruct the cross-complainant in the enjoyment thereof; and all

167 water diverted by said San Joaquin & Kings River Canal & Irrigation Company, Incorporated, may be adjudged to be a part of the water to which said Miller & Lux, Incorporated, is entitled, and that such water shall be, whenever diverted, charged to the quantity of water which it is adjudged said Miller & Lux, Incorporated, is entitled to; and that said Miller & Lux, Incorporated, be further commanded and compelled to restore said Temple Slough, said Poso Slough and said Deep Slough to their natural condition, before the changes were made therein by said Miller & Lux, Incorporated, as herein alleged, and that said Miller & Lux, Incorporated, be forever enjoined and restrained from in any way or manner interfering with or removing or obstructing any dam, or other obstruction placed by cross-complainant in the said Temple

Slough, Poso Slough, or Deep Slough, so long as the cross-complainant does not thereby prevent water running into said sloughs other than such water as the said cross-complainant is entitled to have and take from said river into its said canal, as in this cross bill defined, and that the said Miller & Lux, Incorporated, be enjoined and restrained from diverting or permitting to flow into said sloughs water which would not naturally flow therein, so long as the cross-complainant is not receiving the quantity of water which cross-complainant is entitled to divert at said place where the said cross-complainant diverts water into its canal, as aforesaid, and that the cross-complainant may have such further or other relief as the nature of the case may require and to your Honors may seem meet;

May it please your Honors to grant unto this cross-complainant a writ of subpœna to be directed to said Miller & Lux, Incorporated, commanding it at a certain time, and under a certain penalty
168 therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to perform and abide such further and other direction and decree therein as to this Honorable Court shall seem meet.

And may it further please your Honors, that until the final hearing and determination of this cross-bill, and while the same is pending, the said Miller & Lux, Incorporated, its agents and servants, and all persons acting with, by or under it, may be enjoined and restrained from doing all or any of the aforesaid acts, and that your Honors may grant a writ of injunction for that purpose issuing out of and under the seal of this Honorable court, and that your Honors will issue your order to show cause why such an injunction should not be made and issued as herein prayed for, and that pending the return and hearing of such order to show cause, the said Miller & Lux, Incorporated, its agents and servants, and all persons acting with, by or under it be by order of this Honorable court enjoined and restrained from the commission of all or any of the aforesaid acts.

[SEAL.] EAST SIDE CANAL AND IRRIGATION COMPANY, *Defendant.*
By SAMUEL STEVINSON *6, President.*
JAMES F. PECK,
Solicitor for Cross-complainant.

169 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Samuel Stevinson, being duly sworn, upon his oath, deposes and says:

That he is the president of The East Side Canal & Irrigation Company, a corporation, the cross-complainant above named; that he has read the foregoing cross-complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and that as to those matters, he believes the same to be true.

SAMUEL STEVINSON.

Subscribed and sworn to before me this 7th day of April, 1906.

[SEAL.] MATTHEW BRADY,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) 92. In the Circuit Court of the United States for the Southern District of California, Northern Division. Miller & Lux, Incorporated, Complainant, *vs.* The East Side Canal and Irrigation Company, a corporation, Defendant. Cross Bill. Filed Apr. 9, 1906. Wm. M. Van Dyke, Clerk. Chas. N Williams, Deputy. James F. Peck, Attorneys at Law, Mills Building, San Francisco.

170 To the Marshal of the United States for the Northern District of California.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division.

In Equity.

The President of the United States of America to Miller & Lux, Incorporated, a corporation, Greeting:

You are hereby commanded, That you be and appear in said Circuit Court of the United States aforesaid, at the Court room in Fresno on the 7th day of May A. D. 1906, to answer a Bill of Complaint exhibited against you in said Court by The East Side Canal & Irrigation Company, a corporation cross-complainant, which is a citizen of the State of California and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of April in the year of our Lord one thousand nine hundred and six, and of our Independence the one hundred and thirtieth.

[SEAL.] WM. M. VAN DYKE, *Clerk*,
By CHAS. N. WILLIAMS,
Deputy Clerk

171 *Memorandum Pursuant to Rule 12, Supreme Court U. S.*

You are hereby required, to enter your appearance in the above suit, on or before the first Monday of May next, at the Clerk's Office of said Court pursuant to said Bill; otherwise the said Bill will be taken *pro confesso*.

WM. M. VAN DYKE, *Clerk*,
By CHAS. N. WILLIAMS,
Deputy Clerk

Clerk's Office, Los Angeles, California.
13—518

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify, that I received the within writ on the 10th day of April, 1906, and personally served the same on the 11th day of April, 1906, on Miller & Lux, Incorporated, by delivering to and leaving with David Brown, as Secretary of said corporation Miller & Lux, Incorporated, and also the person designated by certificate filed with the Secretary of State of California as the person upon whom all legal processes, issued against Miller & Lux, Incorporated, the defendants named therein, should be served, personally, at the County of San Francisco, in said district, a copy thereof.

JOHN H. SHINE,
U. S. Marshal,
By R. D. LANEN,
Office Deputy.

San Francisco, April 11th, 1906.

(Endorsed:) Original Marshal's Docket No. 3937. No. 92. U. S. Circuit Court, Ninth Circuit, Southern District of California, Northern Division. In Equity. The East Side Canal & Irrigation Company, a corporation, Cross-Complainant, *vs.* Miller & Lux, Incorporated, a corporation. Subpœna. Filed Jun- 9, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. J. F. Peck, Att'y, Mills Bldg.

172 In the Circuit Court of the United States for the Southern District of California, Northern Division.

MILLER & LUX, INCORPORATED, a Corporation, Complainant,
vs.
THE EAST SIDE CANAL & IRRIGATION COMPANY, a Corporation, Defendant.

THE EAST SIDE CANAL & IRRIGATION COMPANY, a Corporation, Cross-complainant,
vs.
MILLER & LUX, INCORPORATED, a Corporation, Defendant.

*The Demurrer of Miller & Lux, Incorporated, a Corporation, as Defendant, to the Cross-bill of East Side Canal and Irrigation Company, a Corporation, the Above-named Cross-com*complainant.

Miller & Lux, Incorporated, a corporation, defendant in the cross-bill herein, by protestation, not confessing all or any of the matters and things in the said cross-complainant's cross-bill contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said cross-bill of cross-complainant and for cause of demurrer showeth:

1. That the cross-complainant hath not in and by its said
173 cross-bill made or stated such a case as entitles it, in a Court of Equity, to any discovery from this defendant or to any

relief against it as to the matter contained in said cross bill or any of such matters.

2. That in said cross-bill is presented matter improper for a cross-bill.

3. That it appeareth by the cross-complainant's own showing that it is not entitled to the relief it prays.

4. That it appears by said cross-bill that it does not embrace the whole matter which forms the subject-matter of the allegations of said cross-bill, in this particular, to wit: said cross-bill does not allege and exhibit the rights of persons upon whose rights, the cross-complainant alleges, are dependent and, in part, determinable the rights of the complainant and the defendant in the cross-bill.

5. That it appeareth by the cross-complainant's own showing that third parties have an interest in the discovery and ought not to be prejudiced.

Wherefore, and for divers other good causes of demurrer appearing on the said cross-bill, this defendant doth demur thereto. And he prays the judgment of this Honorable Court, whether he shall be compelled to make answer to the said cross-bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

R. E. HOUGHTON,
Solicitor for Defendant, Miller & Lux, Incorporated.

I hereby certify that the foregoing demurrer is in my judgment well founded in point of law.

R. E. HOUGHTON,
Solicitor for Defendant, Miller & Lux, Incorporated.

Dated August 30th, 1906.

174 Due service of within demurrer to cross-bill admitted this 30th day of August 1906.

JAMES F. PECK,
CHAS. C. BOYNTON,
Attorneys for Cross-complainant.

(Endorsed:) Original. No. 92. In the U. S. Circuit Court, Southern Dist. of California, Northern Division. Miller & Lux, Incorporated, a corp., Complainant, *vs.* The East Side C. & I. Co., a corp., Defendant. The East Side C. & I. Co., a corp., Cross-complainant, *vs.* Miller & Lux, Incorporated, a corp., Defendant. Demurrer to cross-bill. Filed Sep. 1, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Houghton & Houghton, Attorneys for Defendant, 1749 Pine Street, San Francisco, Cal.

175 In the Circuit Court of the United States, Southern District of California, Northern Division.

MILLER & LUX, INCORPORATED, a Corporation, Complainant,
vs.
THE EAST SIDE CANAL & IRRIGATION COMPANY, a Corporation, Defendant.

Replication of Complainant, Miller & Lux, Incorporated, to Portion of Answer of Defendant, The East Side Canal & Irrigation Company, to the Amended and Supplemental Bills of Complaint.

This repliant saving and reserving unto itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of that portion of the said answer of said defendant, interposed as a plea to the jurisdiction of this Court to entertain this suit, which portion of said answer is as follows:

That the complainant herein was organized as a corporation in the state of Nevada, as an agent of Miller & Lux, a corporation, organized under the laws of the state of California; and Miller & Lux, a corporation, so organized under the laws of the state of California, is the owner of all the capital stock of the complainant; and complainant has no existence, except as a mere agency of Miller & Lux, a corporation, organized under the laws of the state of California; and all the property held by said complainant is as such agent, and so that suits may be brought and prosecuted in the United States courts, and said complainant does not transact any business or do any act or thing other than such as may be necessary to carry out the purposes of Miller & Lux, a corporation, organized under the laws of the state of California, except to hold title to property for the purpose of prosecuting suits in the United States courts.

176 And further reserving unto itself the right to serve and file exceptions for insufficiency and a general replication to the balance of said answer, for replication to the portion of said answer hereinbefore quoted, denies that the complainant herein was organized as a corporation in the state of Nevada as an agent of Miller & Lux, a corporation, or organized under the laws of the state of California;

Denies that Miller & Lux, a corporation, so organized under the laws of the state of California is the owner of all the capital stock of the complainant;

Denies that complainant has no existence, except as a mere agency of Miller & Lux, a corporation organized and under the laws of the state of California;

Denies that all the property held by said complainant is as such agent, or so that suits may be brought and prosecuted in the United States Courts, or that said complainant does not transact any business or do any other thing other than such as may be necessary to carry out the purposes of Miller & Lux a corporation organized under the

laws of the state of California, except to hold title to property for the purpose of prosecuting suits in the United States Courts;

And complainant further saith, that it doth and will aver, maintain and prove its said amended and supplemental bills of complaint to be true, certain and sufficient in law to be answered unto by the said defendant, and that the portion of the answer of said defendant hereinbefore quoted is very uncertain, evasive, and insufficient in law, to be replied unto by this repliant; without that, that any other matter or thing in the said portion of said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed, or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays as in and by its said
177 amended bill and supplemental bill has already prayed.

Dated March 18 1907.

R. E. HOUGHTON,
Solicitor for Complainant.

(Endorsed:) No. 92. In the U. S. Circuit Court, Ninth Circuit, Southern District of California, Northern Division. Miller & Lux, Incorporated, a corporation, Complainant, *vs.* The East Side Canal & Irrigation Company, a corporation, Defendant. Replication. Filed Mar. 18, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Houghton & Houghton, Solicitors for Complainant, 1749 Pine Street, San Francisco, Cal.

178 In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Northern Division.

No. 92.

MILLER & LUX, INCORPORATED, a Corporation, Complainant,
vs.
THE EAST SIDE CANAL & IRRIGATION COMPANY, a Corporation, Defendant.

The complainant filed its bill of complaint herein on the 15th day of June, 1905, which is hereto annexed;

A subpœna to appear and answer in said cause was thereupon, on said 15th day of June, 1905, issued, returnable on the 7th day of August, 1905, which is hereto annexed;

On the 7th day of August, 1905, the defendant appeared herein by James F. Peck, Esq., its solicitor;

The complainant filed its amended bill of complaint herein on the 15th day of January, 1906, which is hereto annexed;

The complainant filed its supplemental bill of complaint herein on the 27th day of February, 1906, which is hereto annexed;

On the 9th day of April, 1906, the answer of defendant to the amended and supplemental bill of complaint was filed herein, and is hereto annexed;

The cross-complainant, the East Side Canal & Irrigation Company, a corporation, filed its cross-bill herein on the 9th day of April, 1906, which is hereto annexed;

A subpœna to appear and answer to the cross bill in said cause was thereupon, on said 9th day of April, 1906, issued, returnable on the 7th day of May, 1906, and is hereto annexed;

179 The defendant to the cross-bill appeared herein on the 7th day of May, 1906, by R. E. Houghton, Esq., its solicitor;

On the 1st day of September, 1906, the complainant filed herein its exceptions for impertinence to the answer of the defendant, the East Side Canal & Irrigation Company, a corporation, to the bill of complaint herein, which exceptions are hereto annexed;

On the 1st day of September, 1906, the demurrer of Miller & Lux, Incorporated, a corporation, as defendant to the cross-bill of the East Side Canal & Irrigation Company, a corporation, was filed herein, and is hereto annexed;

The report of Lynn Helm, Esq., to whom the exceptions to the answer for impertinence had been referred, was filed herein on the 8th day of January, 1907, and is hereto annexed;

On the 30th day of January, 1907, the exceptions of the defendant to the report of the special master in chancery on the exceptions taken by complainant to the answer of the defendant, were filed herein and are hereto annexed;

The replication of complainant, Miller & Lux, Incorporated, a corporation, to a portion of the answer of defendant, the East Side Canal & Irrigation Company, to the amended and supplemental bill of complaint, was filed herein, on the 18th day of March, 1907, and is hereto annexed;

Testimony was thereafter taken on behalf of the respective parties on the issues joined by said replication, and filed in the Clerk's Office of said Circuit Court;

On the 6th day of May, 1907, being a day in the May Term, A. D. 1907, of said Circuit Court: Present, Honorable Olin Wellborn, District Judge, said cause came on to be heard before the court on the pleadings and proofs, and the cause having thereupon been submitted to the court for its consideration and decision upon the pleadings, proofs and arguments and upon the briefs which

180 were thereafter filed, and the court having duly considered the same, and being fully advised in the premises, thereafter, on the 27th day of January, 1908, being a day in the November Term, A. D. 1907, of said Circuit Court, ordered, that a decree be entered herein, dismissing complainant's bill of complaint for want of jurisdiction, and accordingly, on the 4th day of May, 1908, a final decree was signed, filed, entered and recorded herein, and is hereto annexed.

181 In the Circuit Court of the United States for the Southern District of California, Northern Division.

MILLER AND LUX, INCORPORATED, a Corporation, Complainant,
vs.
EAST SIDE CANAL AND IRRIGATION COMPANY, a Corporation, Defendant.

It is alleged in the Answer herein, "That the complainant herein was organized as a corporation in the State of Nevada, as an agent of Miller and Lux, a corporation, organized under the laws of the State of California; and Miller and Lux, a corporation so organized under the laws of the State of California, is the owner of all the capital stock of the complainant; and complainant has no existence, except as a mere agency of Miller and Lux, a corporation, organized under the laws of the State of California; and all the property held by said complainant is as such agent, and so that suits may be brought and prosecuted in the United States Courts, and said complainant does not transact any business or do any act or thing other than such as "may be necessary to carry out the purposes of Miller and Lux, a corporation, organized under the laws of the State of California except to hold title to property for the purpose of prosecuting suits in the United States Courts."

182 To the foregoing allegation in the answer, the complainant made special replication, and upon the issue joined evidence was taken, argument made, and the same submitted to the Court for decision.

The Court being fully advised in the premises find that the said allegation in defendant's answer is true, and that the complainant holds the title to the lands described in the Bill of Complaint for the purpose of prosecuting and commencing this action in the Circuit Court of the United States, and that the said lands were conveyed to complainant for that purpose, and it appearing to the satisfaction of this Court that the complainant has been collusively made a party plaintiff to this suit for the purpose of creating a case cognizable by the Circuit Court of the United States, and that said suit does not really and substantially involve a dispute or controversy within the jurisdiction of the Circuit Court of the United States.

Now Therefore, upon consideration thereof, it is ordered, adjudged and decreed that the complainant's bill of Complaint herein be, and the same is hereby dismissed and that complainant pay to defendant its cost in this behalf expended, to be taxed. Dated this 4th day of May 1908.

OLIN WELLBORN, *Judge.*

Decree entered and recorded May 4th, 1908.

WM. M. VAN DYKE, *Clerk.*
By CHAS. N. WILLIAMS,
Deputy Clerk.

(Endorsed:) No. 92. In the Circuit Court of the United States, Ninth Circuit. Southern District of California. Northern Division. Miller and Lux, Incorporated, a corporation, Complainant, *vs.* The East Side Canal and Irrigation Company, a corporation, Defendant. Decree, dismissing Bill of Complaint. Filed May 4, 1908. Wm. M. Van Dyke Clerk. Chas. N. Williams Deputy. James F. Peck, attorney at law, 810 Crocker Building, San Francisco, Cal.

183 Whereupon said bill of complaint, subpœna to appear and answer, complainant's amended bill of complaint, complainant's supplemental bill of complaint, answer of defendant to the amended and supplemental bill of complaint; cross-complainant's cross-bill, subpœna to appear and answer to cross-bill, exceptions to the answer of the defendant, demurrer of defendant to the cross-bill, report of special master in chancery on the exceptions to the answer for impertinence, the exceptions of the defendant to the report of the special master in chancery, replication of complainant to a portion of the answer of defendant to the amended and supplemental bill of complaint, and final decree are hereto annexed; said final decree being duly signed, filed and enrolled pursuant to the practice of said Circuit Court.

Attest, etc.,

[SEAL.] WM. M. VAN DYKE, *Clerk.*
Deputy Clerk.

(Endorsed:) No. 92. In the Circuit Court of the United States, Ninth Judicial Circuit, for the Southern District of California, Northern Division. Miller & Lux, Incorporated, a corporation, *vs.* The East Side Canal & Irrigation Company, a corporation. Enrolled Papers. Filed May 4th, 1908. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk. Recorded Decree Register Book No 1, page 140.

184 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division.

No. 92.

MILLER & LUX, INCORPORATED, a Corporation, Complainant,
vs.
THE EAST SIDE CANAL & IRRIGATION COMPANY, a Corporation, Defendant.

Conclusions of the Court.

The present hearing is on an issue raised by the following paragraph of the answer, to wit:

"That the complainant herein was organized as a corporation in the State of Nevada, as an agent of Miller & Lux, a corporation, organized under the laws of the State of California; and Miller &

Lux, a corporation, so organized under the laws of the State of California, is the owner of all the capital stock of the complainant; and complainant has no existence, except as a mere agency of Miller & Lux, a corporation, organized under the laws of the State of California; and all the property held by said complainant is as such agent; and so that suits may be brought and prosecuted in
185 the United States courts; and said complainant does not transact any business or do any act or thing other than such as may be necessary to carry out the purposes of Miller & Lux, a corporation, organized under the laws of the State of California, except to hold title to property for the purpose of prosecuting suits in the United States courts."

Among the facts shown in evidence, are the following:

First. Miller & Lux was a co-partnership prior and up to the death of Charles Lux, one of the partners, who died in March, 1887.

Second. In April, 1897, the heirs of said deceased and Henry Miller, the surviving partner, entered into an agreement to form a California corporation and transfer to it the property of said partnership, each of said persons to receive in lieu thereof capital stock of the partnership proportioned to his interest in the partnership. The purpose of the corporation was to liquidate the business and distribute the assets of said partnership among the persons entitled thereto.

Third. Pursuant to said agreement, the corporation of Miller & Lux was organized, on May the 5th, 1897, under the laws of the State of California, and all of the property of said copartnership was conveyed, and the stock of the corporation distributed as provided in said agreement.

Fourth. Said corporation commenced an action in the Superior Court of Merced County against the defendant herein on the 17th day of December, 1900, which was pending at the time the Nevada corporation was organized.

Fifth. The Nevada corporation of Miller & Lux was organized between June the 12th, 1905, date of the agreement therefor, and the 14th day of June, 1905, when the bill in the pending case was verified. Said corporations are the same in name, purposes,
186 capitalization, directors, officers, office and place of business. All the capital stock of the Nevada corporation was issued to the California corporation, and the property of the former thereafter stood in the name of the latter.

Sixth. The present suit and the one previously dismissed in Merced County, as hereinbefore mentioned, are substantially alike in their essential features.

Seventh. The California corporation has not been dissolved, the alleged reason for its continued existence being the pendency of certain litigation to which it is a party.

Eighth. The agreement for the formation of the Nevada corporation, which was entered into June the 12th, 1905, between the California corporation and stockholders owning more than two-thirds of its capital stock, contained the following recitals:

"Whereas, the laws of the State of California, under which said

corporation 'Miller & Lux' is incorporated, are unsatisfactory in many respects, among others in that they make the stockholders personally liable for the debts of the corporation, do not give to the stockholders as perfect immunity from corporate assessments as do the laws of the State of Nevada, and in that they allow taxation on a so-called corporate franchise, although all of the property of the corporation is taxed at its full value, and although said corporation has no franchise to do anything which every natural person may not lawfully do; and,

"Whereas, said laws of the State of California are in many particulars uncertain and unsettled, so that it is difficult to know with certainty what the powers and rights of the corporation, its directors and stockholders, are; and, particularly, as to dividends, a matter of the most vital importance to us, and as to which litigation is now pending and undetermined; and

"Whereas, we believe that these difficulties do not exist to
187 the same extent under the laws of the State of Nevada, and that those laws are in many other respects much better adapted than the laws of the State of California to accomplish the purposes for which said corporation was formed; and

"Whereas, many of the tracts of land, and many of the canals, ditches, water-rights and other rights in real property owned and held by the said corporation 'Miller & Lux,' extend over several counties in the State of California adjacent to one another, so that in so far as such lands, canals, ditches, water-rights and other rights in real property are situated in one county they are, under the constitution and laws of the State of California, subject to the jurisdiction of the Superior Court in and for that county, and in so far as they are situated in another county are subject to the jurisdiction of the Superior Court in and for that county, and therefore, in the event of controversies or disputes over said lands, canals, ditches, water-rights, or other rights in real property, a multiplicity of litigation may arise, as it has in the past arisen, as to rights and interest of precisely the same character, in which diverse and conflicting decisions and determinations, both of law and of fact, may be made, to the great injury of those interested in said lands, canals, ditches, water-rights, and other rights; and

"Whereas, this result could not happen where the jurisdiction over the whole subject matter of litigation with all its collaterals would be in the same tribunal, as would be the case if such litigation were in the Federal Courts; and

"Whereas, we believe that our rights in litigated cases would be most fully protected and conserved in the Federal Courts to which corporations formed in other States are entitled to resort;

188 "Now, therefore, for the above reasons, and with a view of obtaining for ourselves and for all other stockholders of our corporation the benefit of the laws of Nevada, which we believe give most favorable opportunity for carrying out the purposes for which said corporation was formed, we do hereby agree as follows:"

The dates of the agreement to form the Nevada corporation, of the dismissal of the suit in Merced County, of the verification and

filing of the bill herein, taken together, are significant circumstances in this connection.

There is no evidence whatever of the purpose for which said corporation was formed other than the aforesaid recitals, and inferences from the dates above mentioned, although Mr. Nickel, Vice-President of both corporations, was called as a witness and testified in the case.

The last three of said recitals are competent evidence on the part of defendant, as admissions of the complainant, and together with said inferences, clearly show the purpose for which complainant was organized. The prior recitals, however, assigning additional reasons for such organization, being wholly unsustained by other evidence, can, in view of the undisputed facts of the case, be looked upon, if competent evidence at all for the complainant, only as self-serving declarations, carrying but little or no weight, and to which may well be applied the following language of the Supreme Court, (underscoring in last two lines mine):

"The case comes within the principle announced in Butler *vs.* Farnsworth, 4 Wash. C. C. 101, 103, where Mr. Justice Washing said 'If the removal be for the purpose of committing *a fraud* upon the law, and to enable the party to avail himself of the jurisdiction of the Federal Courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona*
189 *fide* intention of changing his domicile, *however frequent and public his declarations to the contrary may have been*'" 129 U. S. 328, 329." (Lehigh Mining & Manufacturing Co. *vs.* Kelly, 160 U. S. 327-340.)

The statute on which defendant relies provides as follows:

"That if, in any suit commenced in a circuit court * * * of the United States, it shall appear to the satisfaction of said circuit court at any time after such suit has been brought * * * that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable * * * under this act the said circuit court shall proceed no further therein but shall dismiss the suit." (Act of March 3rd, 1875, Sec. 5, 18 U. S. Stat. L. 470.)

From all the evidence in the case, I am satisfied, that the California corporation and its stockholders caused complainant to be organized and transferred to it without any real consideration its properties for the purpose of giving Federal courts jurisdiction of the pending controversy and probably others, that the California corporation still has the right and power to compel the Nevada corporation to re-convey said properties without a valuable consideration if it should at any time see proper to do so, and, that said facts constitute a device of substantially the same character as the one condemned in Lehigh Mining & Manufacturing Co. *vs.* Kelly, *supra*. In that case, the court, after reviewing a number of precedents, says, among other things:

"None of these cases sustain the contention of the plaintiffs. All of them concur in holding that the privilege of a grantee or pur-

chaser of property, being a citizen of one of the States, to invoke the jurisdiction of a Circuit Court of the United States for the
190 protection of his rights as against a citizen of another state—the value of the matter in dispute being sufficient for the purpose—cannot be affected or impaired *merely* because of the motive that induced his grantor to convey, or his vendee to sell and deliver, the property, provided such conveyance or such sale and delivery was a real transaction by which the title passed without the grantor or vendor reserving *or having* any right *or power* to compel or require a reconveyance or return to him *or* the property in question. We adhere to that doctrine.

"In harmony with the principle announced in former cases, we hold that the Circuit Court properly dismissed this action. The conveyance to the Pennsylvania corporation was without any valuable consideration. It was a conveyance by one corporation to another corporation—the grantor representing certain stockholders, entitled collectively or as one body to do business under the name of the Virginia Coal and Iron Company, while the grantee represented *the same stockholders*, entitled collectively or as one body to do business under the name of the Lehigh Mining and Manufacturing Company. It is true that the technical legal title to the lands in controversy is, for the time, in the Pennsylvania corporation. It is also true that there was no formal agreement upon the part of that corporation 'as an artificial being, invisible, intangible, and existing only in contemplation of law,' that the title should ever be reconveyed to the Virginia corporation. But when the inquiry involves the jurisdiction of a Federal court—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record, Grace *vs.* American Central Insurance Co., 109 U. S. 278, 283, Bors *vs.* Preston, 111 U. S. 252, 255—we cannot shut our eyes to the fact that there
191 exists what should be deemed an equivalent to such an agreement, namely, the right *and power* of those who are stockholders of each corporation *to compel* the one holding the legal title to convey, *without a valuable consideration*, such title to the other corporation. In other words, although the Virginia corporation, as such, holds no stock in the Pennsylvania corporation, the latter corporation holds the legal title, subject at any time to be divested of it by the action of the stockholders of the grantor corporation who are also its stockholders. The stockholders of the Virginia corporation—the original promoters of the present scheme, and, presumably, when a question of the jurisdiction of a court of the United States is involved, citizens of Virginia—in order to procure a determination of the controversy between that corporation and the defendant citizens of Virginia, in respect of the lands in that Commonwealth, which are here in dispute, assumed, as a body, the mask of a Pennsylvania corporation for the purpose, and the purpose only, of invoking the jurisdiction of the Circuit Court of the United States, retaining the power, in their discretion, and after all danger of defeating the jurisdiction of the Federal court shall

have passed, to throw off that mask and reappear under the original form of a Virginia corporation—their right, in the meantime, to participate in the management of the general affairs of the latter corporation not having been impaired by the conveyance to the Pennsylvania corporation. And all this may be done, if the position of the plaintiffs be correct, without any consideration passing between the two corporations."

From this quotation, it will be seen, that the court expressly declared that "the right *and power* of those who are stockholders of each corporation *to compel* the one holding the legal title to convey, *without a valuable consideration*, such title to the other cor-
192 poration" was equivalent to a formal agreement upon the part of the foreign corporation to reconvey to the domestic corporation, and the existence of such "right and power," which was the controlling circumstance in that case, is precisely the situation in the case at bar.

In Mr. Treadwell's brief occurs the following passage:

"It is therefore manifest that what was really done in this matter amounted to a change of residence from California to Nevada, a removal, *animo manendi*, which, whatever its motive, was effectual to confer a Nevada citizenship. Had the title to this property still been in the persons who formed the California corporation and conveyed this property to it, and had they all been (as many of them were not) citizens of California, they might lawfully have all removed to Nevada, even although their only reason was a preference for the Federal courts. What they could have done in that way, had they retained the title, they could lawfully accomplish in this manner, as things were. By the extinction of the California corporation and the formation of one in Nevada, the same result was brough- about as in the case of a change of residence by a natural person."

This argument is manifestly unsound in its assumption as a fact of that which the evidence shows to be untrue, namely, "the extinction of the California corporation." That corporation has not been dissolved, nor can it be now said when it will be dissolved. No matter what causes may have postponed its dissolution, the important fact of its continued existence is undisputed, and it can at any time compel the Nevada corporation to reconvey to it without valuable consideration title to the property here in controversy. This is precisely the situation described by the Supreme Court in the following clause of the above quotation:

193 "It is also true that there was no formal agreement upon the part of that corporation 'as an artificial being, invisible, intangible, and existing only in contemplation of law,' that the title should ever be reconveyed to the Virginia corporation. But when the inquiry involves the jurisdiction of a Federal court—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record, Grace *vs.* American Central Insurance Co., 109 U. S. 278, 283, Bors *vs.* Preston, 111 U. S. 252, 255—we cannot shut our eyes to the fact that there exists what should be deemed an

equivalent to such an agreement, namely, the right *and power* of those who are stockholders of each corporation *to compel* the one holding the legal title to convey, *without a valuable consideration*, such title to the other corporation."

The application, therefore, to this case of the principles governing a change of residence by a natural person, is fatal to Mr. Treadwell's argument. In the latter case, citizenship to be newly acquired in one State must be absolutely abandoned in the other, while, in the case at bar, citizenship is claimed in Nevada, although still existing in California.

Irvine Company *vs.* Bond, 74 Fed. 849, is distinguishable from the case at bar. There the several reasons assigned by complainant for its organization and ownership of the property in suit were satisfactorily proven, and one of the main allegations of the plea impugning the integrity of said transactions disproven at the hearing.

The rule of law, in support of which the brief of complainant and also that of Mr. Treadwell, cite many authorities, Blair
194 *vs.* Chicago, 201 U. S. 400-448, being the latest, to the effect, that, where the jurisdictional facts exist, the motive of the plaintiff for invoking Federal jurisdiction is immaterial, will be readily conceded. In the case at bar, however, the sole issue now on trial is whether or not the requisite jurisdictional facts do exist, directly involving, among other questions, the purpose of complainant's organization and the transfer to it of property previously belonging to the California corporation. The rule of law, therefore, above mentioned, is inapplicable here, and, for this reason, as well as because said rule is conceded, the authorities cited in its support need not be further considered. Nor is it necessary for me now to review in detail any of the other authorities cited in said briefs, since Lehigh Mining & Manufacturing Co. *vs.* Keely, *supra*, is, in my opinion, directly in point and conclusive here.

Complainant's suggestions, that the citations of the decision in the Lehigh Mining & Manufacturing case do not support its conclusions, and, that the better reasoning is found in the dissenting opinion, are not in accord with my own views, but if they were, they could not be favorably entertained here, for the obvious reason, that said decision, without regard to the precedents it cites, or strength of the dissenting opinion, is authoritative in this court.

The bill will be dismissed for want of jurisdiction, and defendant's solicitor is requested to submit a suitable form of decree.

OLIN WELLBORN, *Judge*.

(Endorsed:) No. 92. U. S. Circuit Court, Southern District of California. Northern Division. Miller & Lux, Inc., *vs.* The East Side C. & I. Co. Conclusions of the Court. Filed Jan. 27, 1908. Wm. M. Van Dyke, Clerk.

195 In the Circuit Court of the United States, Southern District of California, Northern Division.

MILLER & LUX, INCORPORATED, a Corporation, Complainant,
vs.
THE EAST SIDE CANAL & IRRIGATION COMPANY, a Corporation, Defendant.

On application of R. E. Houghton, solicitor for complainant, it is hereby ordered by the court that George W. Cherry of the city and county of San Francisco, be and he is hereby appointed a Special Examiner in the above entitled suit, and that it be referred to him to take testimony as to the truth of the following plea to the jurisdiction of this court to entertain this suit, contained in the answer of defendant to the amended bill of complaint, and in the supplemental bill of complaint in this suit viz:

That the complainant herein was organized as a corporation in the state of Nevada, as an agent of Miller & Lux, a corporation, organized under the laws of the state of California; and Miller & Lux, a corporation, so organized under the laws of the state of California, is the owner of all the capital stock of the complainant; and complainant has no existence, except as a mere agency of Miller & Lux, a corporation, organized under the laws of the state of California; and all the property held by said complainant is as such agent, and so that suits may be brought and prosecuted in the United States courts, and said complainant does not transact any business or do any act or thing other than such as may be necessary to carry out the purposes of Miller & Lux, a corporation, organized under the laws of the state of California, except to hold title to property for the purpose of prosecuting suits in the United States courts.

and to report such testimony to this court on or before the 1st day of May 1907.

OLIN WELLBORN, *Judge*.

Dated March 18th 1907.

196 (Endorsed:) No. 92. In the U. S. Circuit Court, Ninth Circuit, Southern District of California, Northern Division. Miller & Lux, Incorporated, a corporation, Complainant, *vs.* The East Side Canal & Irrigation Company, a corporation, Defendant. Order Appointing Special Examiner. Filed Mar. 18, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Houghton & Houghton, Solicitors for Complainant, 1749 Pine Street, San Francisco, Cal.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States, for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original Order appointing Special Examiner, made and entered by said Court March 18th, 1907 in the cause entitled Miller & Lux, Incorporated, a corporation, Complainant, *vs.* The East Side Canal & Irrigation Com-

pany, a corporation, Defendant, No. 92 Northern Division, and remaining of record therein.

Attest my hand and the seal of said Circuit Court, this 18th day of March, A. D. 1907.

[SEAL.] WM. M. VAN DYKE, *Clerk*,
By CHAS. N. WILLIAMS, *Deputy*.

Due service of within Order appointing Special Examiner admitted this 21st day of March 1907.

JAMES F. PECK,
Attorney for Defendant.

(Endorsed:) No. 92. In the U. S. Circuit Court, Ninth Circuit, Southern District of California, Northern Division. Miller & Lux, Incorporated, a corporation, complainant, *vs.* The East Side Canal & Irrigation Company, a corporation, Defendant. Certified copy. Order Appointing Special Examiner. Houghton & Houghton, Solicitors for Complainant, 1749 Pine street, San Francisco, Cal.

197 In the Circuit Court of the United States, Southern District of California, Northern Division.

MILLER & LUX, INCORPORATED, a Corporation, Complainant,
vs.
THE EAST SIDE CANAL & IRRIGATION COMPANY, a Corporation, Defendant.

Report of Special Examiner.

To the Honorable Judges of the Circuit Court of the United States for the Southern District of California, in Chancery sitting:

In pursuance of an order of reference made in the above entitled action and dated the 18th day of March, 1907, I, Geo. W. Cherry, the subscriber hereto, appointed a special examiner to take testimony as to the truth of the plea to the jurisdiction of the Court to entertain said suit, contained in the answer of defendant to the amended bill of complaint and the supplemental bill of complaint in said suit, do hereby report as follows:

That in pursuance of said order appointing me as special examiner I gave due notice to the attorneys for the respective parties to the above entitled cause, that I would be at my office, Room 507 Monadnock Building, San Francisco, California, at 10 o'clock A. M. Thursday April 18th, 1907, and be ready to proceed with the testimony in said cause and would be ready to commence the taking of testimony in chief in said action and to have their witnesses pres-
198 ent to testify in said cause:

That on the 18th day of April, 1907, I was attended by R. E. Houghton, Esq., solicitor for complainant, and James F. Peck, Esq., solicitor for defendant, and the following proceedings were had:

J. LEROY NICKEL, witness produced in behalf of defendant, being by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in said cause, testified as follows, to wit:

Examined by J. F. PECK, Esq., Attorney for defendant:

Q. Mr. Nickel, are you an officer of Miller and Lux, Incorporated?

A. Yes sir.

Q. What official position do you hold in that corporation?

A. Vice President.

Q. Were you an officer of the corporation of Miller and Lux?

A. Yes.

Q. And are still an officer of Miller & Lux?

A. Yes sir.

Q. What official position do you hold?

A. Vice President.

Q. How long have you held that position?

A. Since its formation in 1897.

Q. Prior to the incorporation of Miller & Lux in 1897 was there a copartnership known as Henry Miller and Charles Lux?

A. A copartnership consisting of Charles Lux and Henry Miller.

Q. Under the firm name of Miller and Lux?

A. Yes.

Q. And the firm name was Miller and Lux?

199 A. Style of the firm was Miller & Lux.

Q. That continued up to the death of Mr. Lux?

A. Up to the death of Mr. Lux.

Q. When did that occur?

A. In March 1887.

Q. And subsequent to his death the corporation of Miller and Lux, organized under the laws of the State of California, was incorporated, was it not?

A. Subsequent?

Q. Subsequent to the death of Mr. Lux?

A. The business was continued for more than five years, I think probably seven,—continued up to 1897, exactly ten years in the name of Henry Miller surviving partner.

Q. And in 1897 the corporation of Miller & Lux, organized under the laws of the State of California, was incorporated?

A. Yes.

Q. Who were the incorporators of Miller and Lux under the laws of the State of California, the persons?

A. I do not quite understand the question.

Q. The people who incorporated Miller and Lux under the laws of the State of California, were they or were they not, the same persons who were interested in the assets that theretofore belonged to the copartnership of Miller and Lux?

A. Yes.

Q. They were the same persons?

A. Same persons.

Q. And was there any person other than persons who were inter-

ested in the copartnership of Miller and Lux and who were incorporators of the incorporation of Miller and Lux?

A. No.

Q. No outsiders at all?

A. No sir.

Q. How was the stock of the corporation of Miller and Lux, organized under the laws of the State of California, divided?

A. Equally, except five shares were purchased by Henry Miller to give him control.

200 Q. What do you mean by equally?

A. One-half to Henry Miller plus five shares to give him the control, and the remainder to the estate of Charles Lux.

Q. You used the words estate of Charles Lux, you mean persons interested in the estate?

A. Yes, the estate was then distributed to the heirs.

Q. In what proportion was that stock distributed to the persons interested in the estate of Charles Lux?

A. What proportion?

Q. Yes?

A. That I could not answer,—in proportion to their interests.

Q. They took the stock that was distributed to them, took the remainder of the stock that Mr. Miller did not get, in proportion to their interests as successors of Charles Lux in the original copartnership of Miller & Lux?

A. Yes.

Q. Prior to the incorporation of Miller and Lux, Incorporated, was there any litigation pending between Miller and Lux and the East Side Canal and Irrigation Company, the defendant in this suit?

A. Yes, suit had been brought.

Q. In what county?

A. Merced.

Q. Was that suit pending at the time of the incorporation of Miller and Lux, Incorporated?

A. Was it pending?

Q. Yes?

A. Yes.

Q. That suit was brought by whom as the plaintiff?

Mr. HOUGHTON: I object on the ground that the record is the best evidence, and that it is incompetent.

A. California corporation, Miller and Lux, as I remember it.

201 Mr. PECK:

Q. Mr. Nickel, do you remember whether the land claimed by the plaintiff in that case,—the case in Merced County, included the same land described in the complaint in this action?

Mr. HOUGHTON: I object to that on the ground it is not the best of evidence and incompetent.

Mr. PECK: There is no dispute.

Mr. HOUGHTON: There is a dispute.

Mr. PECK: That it is not the same land?
Mr. HOUGHTON: Yes.

Mr. PECK:

Q. Do you know Mr. Nickel?
A. I think that it included all of that land. The land that was described in the original suit is contained in the suit subsequently brought, if that is your question.
Q. What is your general memory?
Q. My memory is that the original suit brought in Merced County was dismissed, and subsequently a suit was brought in the Federal Court which contained all of the lands embraced in the suit brought in the State Court, with other additional lands.
Q. What is your memory of the amended pleadings?
A. I can't remember that.
Q. Who first suggested the organization of the Nevada corporation, Mr. Nickel?
A. Probably I did, but I am not sure.
Q. Do you remember the suit that went to judgment between Mr. James J. Stevenson as plaintiff and the San Joaquin and Kings River Canal and Irrigation Company *is* defendant?
A. Yes, sir.
Q. Tried in Merced County?
A. Yes, sir.
Q. Was the suggestion of the incorporation of the Nevada corporation prior or subsequent to the decision of Judge Short in that case?
202 A. I could not remember, because it did not have any connection with the incorporation.
Q. What time was it to the best of your memory?
A. I do not remember that because it never made any impression on my mind because it had no bearing on it.

Mr. PECK: I move to strike out the part that he had no memory on that.

WITNESS (continuing): What I mean, Mr. Peck, that it had no bearing on it, as well as I can remember there was no reasons connected with that suit that influenced us in the formation of the corporation in Nevada, if that is what you mean by your question.
Mr. PECK: I did not ask you that question, I only asked you the time?
WITNESS: That is the reason I gave you the answer, the time made no impression on my mind and for that reason I could not recall the time.

Mr. PECK: We give notice at this time that we will move to strike out the reasons as not responsive to the question.

Mr. PECK:

Q. Do you remember the date of the organization of the corporation of Miller and Lux in Nevada?
A. I think it was July 1905 is my remembrance. Wait a minute,

I think it must be earlier than that. Just this minute I cannot say, I recall——

Q. Do you remember the date that Judge Short announced his opinion in the case in Merced County between James J. Stevenson——

A. I do not.

Q. Do you remember whether it was the month of April, 1905?

A. I could not tell you.

Q. In the organization of Miller and Lux in Nevada, was there a contract made between the stockholders of Miller and
203 Lux a corporation in the State of California with reference to the subscribing of stock in that corporation?

A. There was, yes, sir.

Q. Have you that contract with you?

A. Yes.

Q. The document you hold in your hand, that is the agreement, is it not, Mr. Nickel?

A. Yes sir.

Q. And the signatures thereto are made by the parties, or purports to have been made by the parties?

A. Yes sir.

Mr. PECK: Now we offer this agreement in conjunction with the testimony of Mr. Nickel and ask that it be marked for identification, as a copy of the agreement.

(The agreement referred to is dated the 12th day of June, 1905, and is an agreement between "Miller & Lux", a corporation, and the stockholders holding more than two-thirds of the capital stock of said corporation. Same being marked for identification as "Exhibit A.")

Mr. PECK:

Q. This contract was not signed by all of the stockholders of the California corporation of Miller and Lux, was it?

A. No sir.

Q. It was agreed to by all the stockholders except one, was it not?

A. Yes sir, I think so.

Q. Mrs. Melissa A. Potter?

A. Yes sir.

Q. Was any resolution of the corporation of Miller and Lux in California passed with reference to the incorporation of Miller and Lux in the State of Nevada?

A. Yes sir.

Q. Have you that resolution?

A. Yes sir, I brought a copy of that resolution.

Q. What date was that resolution passed?

204 A. June 5th, 1905.

Q. Have you the minutes of the corporation with you?

A. Yes sir.

Q. Will you produce them?

A. Yes.

Q. The pages of minutes you produce is the resolution passed by

the Board of Directors of Miller and Lux, the California corporation, Mr. Nickel?

A. Yes sir.

Q. And these are correct minutes of what transpired before the Board of Directors of that corporation at those several dates as shown by these minutes?

A. Everything that it contains, yes sir.

(Minutes admitted in Evidence and marked "Exhibit B.")

Q. What was the capital stock of the Nevada corporation as compared with the California corporation?

A. Same.

Q. What was the Board of Directors as compared with the California corporation?

A. Same.

Q. What were the purposes of the Nevada corporation as compared with the California corporation?

A. Same.

Q. What were the powers of the corporation as compared with the California corporation?

A. The powers I think were identical.

Q. Were they enumerated on the face of the Articles of Incorporation identical?

A. I think so.

Q. How was the stock of the Nevada corporation distributed?

A. To the California corporation.

Q. In what proportion?

A. In the same. The California corporation holds all the stock in the Nevada corporation.

Q. What were the number of shares of the Nevada corporation?

A. One hundred and twenty thousand.

Q. What reference to the California corporation?

205 A. Same.

Q. So that the Nevada corporation has exactly the same capital and the same number of shares as has Miller and Lux?

A. Yes.

Q. Miller and Lux of California have the shares of the Nevada corporation, the whole one hundred and twenty thousand shares?

A. One hundred and twenty thousand shares, yes.

Q. How many Directors, you state they have the same number of Directors?

A. Same number.

Q. Who are the Directors of the Nevada Corporation?

A. Henry Miller, E. T. Allen, A. N. Lewis, Mr. L. F. Monteagle, J. Leroy Nickel, Mr. G. Gutsch and Thomas B. Bishop.

Q. The Directors of Miller and Lux in California are the same individuals as the Directors of Miller and Lux in the State of Nevada?

A. Yes sir.

Q. Where is the office of Miller and Lux in the State of Nevada with reference to the office of Miller and Lux of California?

A. 825 Howard.

Q. Both are at the same place?

A. Yes sir.

Q. Where are the subordinate officers other than the Directors, who are they in the two corporations?

A. Secretary David Brown.

Q. In both corporations?

A. Yes sir.

Q. Treasurer the same?

A. Yes sir.

Q. And the clerical force employed for both corporations is the same?

A. No clerical force employed by the California corporation.

206 Q. Does it keeps no books at all?

A. No sir, no books kept.

Q. Just stock?

A. Yes sir, just stock.

Q. Had the books of the California corporation been closed up?

A. Yes sir, no books.

Q. Balance struck?

A. Yes sir, no business whatever, all transferred.

Q. How is that?

A. Assets have all been transferred.

Q. With the assumption of the liabilities?

A. Yes sir.

Q. The Nevada corporation took over all tangible assets, real and personal, and all the intangible assets due to Miller and Lux a corporation and assumed all the liabilities of Miller and Lux of this State?

A. Yes sir.

Q. And also all the stock in other corporations?

A. Yes sir.

Q. Miller and Lux of the State of California own a majority of the capital stock of the San Joaquin and Kings River Canal and Irrigation, does it not?

A. Yes sir.

Q. And at the time that it incorporated Miller and Lux Of Nevada it also incorporated in Nevada the corporation San Joaquin and Kings River Canal and Irrigation Company, did it not?

A. Yes sir.

Q. And that corporation had theretofore been a corporation in the State of California, had it not?

207 A. Yes sir.

Q. That canal company was the company that diverted water from the San Joaquin River?

A. Yes sir.

Q. And in Fresno County, place of diversion Fresno County?

A. Yes sir.

Q. Distributed that water through part of Fresno County, part of Merced County and Stanislaus County?

A. Yes sir.

Q. Water was taken and appropriated for sale, rental and distribution?

A. Yes sir.

Q. And the Directors of that corporation in Nevada were the same as the Directors of that corporation in the State of California, were they not?

A. Yes sir.

Q. And the capitalization of that corporation was the same in Nevada as in this state, was it not?

A. I doubt that, I think we reduced it. No it is the same.

Q. And the purposes of the corporation was the same in the State of Nevada as in the State of California, was it not?

A. Yes sir.

Q. And the officers of that Corporation remain now at the same place as prior to the incorporation of the Nevada corporation?

A. Yes sir.

Q. With the same offices?

Mr. Houghton: We object to all this as irrelevant and immaterial, so far as this present action is concerned; that is all this testimony about incorporation or reincorporation of the Canal Company in Nevada.

Mr. Peck:

Q. After the incorporation of the Nevada corporation the suit that was then pending in Merced County that you testified to was
208 dismissed in that county, was it not? The suit that was pending in Merced County at the time of the organization of the Nevada Corporation, was dismissed after the organization of that corporation?

Mr. Houghton: We object to that. The records is the best evidence, and it is incompetent.

A. It was not.

Mr. Peck:

Q. After the dismissal of that action the present action was brought in the United States Federal Court?

A. Yes sir.

Q. There was a contract Mr. Nickel made was it not before the organization of the original corporation of Miller and Lux between the parties interested?

A. Yes sir.

Q. Will you produce that contract, Mr. Nickel?

A. I will.

(The contract referred to is produced and Marked "Exhibit C," offered in evidence and made a part of this deposition. Said agreement being dated the *8th day of April 1897* and entered into between *Henry Miller, first party, and Henry Lux*, et *et al., second parties, etc. etc., etc.*)

Q. Have you the Articles of Incorporation of Miller and Lux of California with you?

A. Yes.

Q. Have you those in your hand, Mr. Nickel?
A. Yes sir.
Q. Those are the certified copy of the Articles in the office of the Secretary of State of the State of California?
A. Yes sir.
Q. We offer them in evidence and ask that they be marked as defendant's "Exhibit D"?

(Said Articles are hereby referred to and made a part
209 of this deposition, same being marked Defendant's "Exhibit D.")

Q. Have you the Articles of Incorporation of Miller and Lux incorporated in the State of Nevada?
A. Copy of the Articles I have produced is identical with the Articles——
Q. Contained in the contract?
A. Yes sir.
Q. That we have heretofore introduced in this examination. That is true Mr. Nickel?
A. Yes sir.
Q. You say that Miller and Lux at the time of the incorporation was the owner of the majority of the stock of the San Joaquin and Kings River Canal and Irrigation Company, how long had that continued?
A. How long had that continued?
Q. Yes, since about what year?
A. I could not say, but prior to 1887.
Q. 1887?
A. 1887.
Q. And had elected Directors of that corporation also through the handling of that stock?
A. Through the majority of that stock.
Q. Mr. Henry Miller President of both corporations?
A. Yes sir.
Q. And you are the Vice President of both corporation-?
A. Yes sir.
Q. And the offices of both corporations in the same office as Miller and Lux?
A. Yes sir.
Q. Mr. Brown Secretary of that corporation?
A. Mr. Merritt.
Q. And Treasurer too was he not?
A. No I was Treasurer.
Q. You were Treasurer and Vice President?
A. Vice President and Treasurer.
210 Q. Vice President and Treasurer?
A. Yes sir.

James E. Peck, Esq., solicitor for defendant announced completion of testimony in chief, and by agreement of counsel for the respective parties the taking of further testimony in said cause was

continued to Monday April 22d, 1907, at 2 o'clock P. M., at the same place.

By agreement on Counsel for the respective parties the taking of testimony in this case is continued from 2 o'clock P. M. Monday April 22d, 1907 to 2 o'clock P. M. Tuesday April 23d, 1907 at the same place.

By agreement of counsel for respective parties the taking of testimony in this case is continued from 2 o'clock P. M. Tuesday April 23d, 1907 to 2 o'clock P. M. Thursday April 25th, 1907, at the same place.

Pursuant to stipulations and agreements as above stated, I was attended, at 2 o'clock P. M. Thursday April 25th, 1907, by R. E. Houghton, Esq., solicitor for complainant, and James F. Peck, Esq., solicitor for defendant, and the following proceedings were had:

J. LEROY NICKEL, Esq., witness produced in behalf of defendant, testified as follows:

Examined by R. E. HOUGHTON, Esq., solicitor for Complainant:

Q. Mr. Nickel, you were asked who was the first to suggest the organization of the Nevada corporation, and you stated you
211 thought you were, when was it that a consideration or discussion was first given to the matter of forming a corporation outside of the State of California in connection with Miller & Lux?

Mr. PECK: I object to the form of the question, Mr. Houghton, on the ground that a day has been appointed for you to introduce your own testimony,—not for the purpose of cross-examination.

A. In 1897 when the corporation was originally formed.

Q. What consideration was given to it at that time, what was done?

A. Considerable, the laws of several states were examined, and it was decided by all of the attorneys who were engaged who represented the different interests, namely, Mr. Bishop, Mr. Delmas, Mr. Treadwell, Mr. Page and myself, to form a corporation under the laws of the State of New Jersey, and it was only after Mr. Miller objected that it was abandoned. Mr. Miller objected to forming it under the laws of any other state than California.

Q. When was that taken up again?

A. It was taken up by me to the extent of having the laws of several states—I think particularly Nevada, investigated about—let's see I would not be certain, but about four years before it was finally incorporated in Nevada.

Q. And was consideration given to that from that time you took it up until the time the corporation was formed?

A. Not actively or continuously, at that time I had Mr. Frohman report. He reported the State of Nevada's laws at that time were not favorable, and I abandoned it, although I discussed it several times but never to the extent—I had discussed it several times after that but never to the extent I did then.

212 Q. You were asked Mr. Nickel whether Miller & Lux, Incorporated were organized in Nevada or the Nevada corporation was organized prior or subsequent to the decision of Judge Short in the case which was before him and you were not able to give the facts, you stated I think you were in doubt about it?

A. Yes sir, I was in doubt.

Q. I offer in evidence the decision of Judge Short in the case of J. J. Stevenson against the San Joaquin and Kings River Canal and Irrigation Company, it was filed (it don't seem to be dated) April 2d, 1906, and ask that it be marked Plaintiff's "Exhibit No. One."

(The instrument referred to is marked as requested and made a part of this testimony.)

Q. Then I offer in evidence the decree in the case of J. J. Stevenson *vs.* The San Joaquin and Kings River Canal and Irrigation Company, which is marked filed April 2nd, 1906, and that will be marked Plaintiff's "Exhibit "No. 2."

(Said instrument is marked as requested and made a part of this testimony.)

Q. Now I offer in evidence the decision or document endorsed "Decision of Court" in the case of J. J. Stevenson against the San Joaquin and Kings River Canal and Irrigation Company.—Merced County, which is endorsed "Filed October 29th, 1905." and let it be marked Defendant's "Exhibit No. 3."

(Said document is marked as requested and made a part of this testimony.)

Q. Now I offer in evidence a certified copy of the complaint in the case of Miller & Lux, a corporation, against the East Side Canal and Irrigation Company, a corporation, filed in the Superior Court of Merced County, State of California, No. 1835.

(Said complaint is marked Plaintiff's Exhibit No. 4" and made a part of this testimony.)

213 Q. Now I offer in evidence the stipulation of Houghton & Houghton, attorneys for plaintiff in the case of Miller & Lux, a corporation, against the East Side Canal and Irrigation Company, defendant, in the Superior Court of Merced County, State of California, dated June 15th, 1905, and directing the Clerk to dismiss that action.

(Said document is marked Plaintiff's "Exhibit No. 5" and made a part of this testimony.)

Q. I now offer in evidence the dismissal of that action,—a certified copy of it, and it is dated the 17th day of June, and it is in the same case of Miller & Lux against the East Side Canal and Irrigation Company, in Merced County.

(Said document is marked Plaintiff's "Exhibit No. 6" and made a part of this testimony.)

Q. What steps, Mr. Nickel have been taken, if any, to disincorporate the corporation of Miller & Lux that was incorporated in the State of California?

A. None.

Q. Why?

A. On account of pending litigation precludes it.

Q. Then you are simply waiting the determination or closing of that litigation to wind up the corporation of Miller & Lux?

A. Yes sir.

Q. You stated in your direct examination that the stockholder who did not sign the agreement in connection with the incorporation of Miller & Lux, Incorporated, in Nevada, was Melissa A. Potter?

A. Yes sir.

Q. How many shares of stock had she in the corporation of Miller and Lux in California?

A. Seven thousand five hundred shares.

Q. Did she ever have any more or less?

A. I think that was the full amount that stood in her name, she may have less now.

Q. Has she ever transferred any of that stock to any one?

214 A. Yes, ten shares stand now in the name of her son.

Q. Who represented her as attorney in connection with her interest in the Miller and Lux corporation?

A. James F. Peck.

Q. In all litigation and in all questions that you have had where an attorney has been employed or where the corporation of Miller and Lux have had dealings has he represented her?

A. Yes sir.

Mr. PECK:

Q. Has any resolution ever been passed Mr. Nickel to disincorporate Miller & Lux in the State of California?

A. No sir.

Q. Is there anything in the agreement for the incorporation of Miller and Lux in Nevada that provides for the disincorporation of Miller and Lux in the State of California?

Mr. HOUGHTON: The agreement is in evidence.

A. I could not answer that question definitely.

Mr. PECK:

Q. Has there ever been any action of the Board of Directors of Miller and Lux, or action by a considerable part of the stockholders at a stockholders' meeting where resolutions were passed regarding the disincorporation of the corporation of Miller and Lux in the State of California?

A. No sir.

Q. That is the way it stands to day?

A. Yes.

Q. The litigation that you speak about as retarding the disincorporation of Miller and Lux, suits pending in the State of California,

known as the case of Baldwin against Miller and Lux and Melissa A. Potter and others, in that litigation the question involves the right of Miller & Lux to amend its articles of incorporation as was attempted, what is known as amendments to the articles of in-
215 corporation of Miller and Lux, is it not?

A. Yes sir.

Q. In that amendment of the articles of co-poration of Miller and Lux it was provided that a three per cent. dividend should be paid annually out of Miller and Lux?

A. Yes sir.

Q. If the profits of Miller and Lux were not sufficient then there should be an enforced sale of property of Miller and Lux to provide funds sufficient for that purpose, was there not?

A. It should be paid out of sales of property.

Q. But if the profits were not sufficient, then the amended articles commanded the sale, did they not?

A. No I do not think so.

Q. So adjudged by the Court?

A. What.

Q. Adjudged by the court that the Directors do pay it by forced sale of property in case the profits are not sufficient to make payment of dividend of three per cent. annually?

A. Provided they should pay out of the profits or forced sales of real estate if necessary. That does not in my judgment preclude them from borrowing the money if they deem it necessary rather than sacrifice the property.

Q. However, the articles of incorporation themselves provide that this dividend shall be paid out of the profits, does it not?

A. Yes sir.

Q. Secondly it provides that if the profits are insufficient then a sale of property must take place, does it not, for the purpose of providing a fund out of which dividends are to be paid?

A. Yes, that is my remembrance of it.

Q. Provides further, does it not, that the sales of real prop-
216 erty shall be distributed as dividend annually, does it not?

A. After the payment of three hundred and sixty thousand dollars in sales, in excess of that, yes.

Q. That is in case the profits, Mr. Nickels, are sufficient to make three hundred and sixty thousand dollars, and in addition to the profits there are sales of real estate, these sales of real estate are distributed equally, are they not?

A. That is a rather hard question to answer, Mr. Peck.

Q. The articles are here?

A. The articles would not help me, I am very conversant with the subject, I have studied it a great deal, and I am i ndoubt about that. I take this view of it: that is to say, if the profits are $150,000 and a few months before the end of the fiscal year sales should be made of real estate for $260,000, we will say the whole of that would go to make up the $360,000.

Q. Regardless of how much the profits were?

A. Yes sir.

Q. And the profits in that instance would not be a primary fund but a secondary fund to pay the dividend?

A. I do not know exactly what sense you use primary.

Q. I mean recourse had to pay the three per cent., by sales of real estate rather than profits?

A. I will state again, if the profits were $100,000 and the sales of real estate $260,000, these two sums will be paid to make up the $360,000.

Q. No question about that, because you hav'n't either sales of real estate or profits in excess of the dividend, suppose, however, the sales of real estate amounted to $250,000 and the profits to
217 $250,000, out of which fund would the dividend be primarily paid?

A. Profits.

Q. What is that?

A. Profits.

Q. Suppose $10,000 came out of the sale of real estate, that would augment the $250,000 profit?

A. Yes sir.

Q. And the $240,000 remaining of the real estate would be distributed?

A. Yes, sir, that is right.

Q. Now Miller and Lux—Henry Miller, is the owner of about what proportion of the stock of Miller and Lux?

A. Sixty per cent?

Q. About sixty per cent?

A. Yes sir.

Q. Is there a proportionate number of Board of Directors elected by him?

A. We have never drawn the lines closely to determine that.

Q. Then any way the stock of Mr. Miller *as* more than a majority of the directors?

A. Yes sir.

Q. Mr. Henry Miller in that way has incorporated his properties, has he not?

A. Incorporated what?

Q. His properties, individual properties?

A. Yes sir.

Q. That is what is known as the articles of the Las Animas and San Joaquin Land Company?

Mr. HOUGHTON: Object to that as irrelevant and incompetent.

A. Yes sir.

Mr. PECK:

Q. In the articles of incorporation of Miller and LUX there is a provision which prohibits, without the unanimous consent of
218 the Board of Directors, the purchase of real property, does it not Mr. Nickels?

A. Yes sir.

Q. The Las Animas Land Company, has it purchased any real

property in the neighborhood of the holdings of Miller and Lux since the incorporation of Miller and Lux?

Mr. HOUGHTON: Object as irrelevant and immaterial.

A. Yes sir.

Mr PECK:

Q. Immediately adjacent to the holdings of Miller and Lux.
A. Yes sir.
Q. In Fresno County?
A. Yes sir.
Q. Madera County?
A. What county?
Q. Madera County?
A. Yes sir.
Q. And in Merced County?
A. Yes sir.

Q. In the amended articles of incorporation of Miller and Lux, are there any provisions which determine what property shall be sold to make up the $360,000 in case a sale of property is necessary?

Mr. HOUGHTON: Object as incompetent, the articles themselves are the best evidence.

Mr. PECK:

Q. Is there any provision which designates how the property offered for sale is to be selected?
A. No sir.
Q. The will of the directors of Miller and Lux determine this?
A. Yes sir.
Q. As to the time of a sale, is there anything in the amended articles that designate when the sale shall take place in case sale of property is necessary?
A. I think not.
Q. Is there anything in these articles which designates the amount of property that shall be sold in case a sale is necessary?
A. No sir.

219 Q. Is there anything in there to designate how much or the size of the parcels of land that can be sold, all of these things are left to the will of the Directors of Miller and Lux?
A. Yes sir.

Q. The case of Baldwin against Miller and Lux you spoke about and which you say delayed the disincorporation of Miller and Lux in the State of California, is on appeal by Melissa A. Potter, stockholder, to the Supreme Court this state, is it not?
A. Yes sir.

Q. And as I understand, the question there is presented for decision as to whether the articles which requires an enforced sale of the property of Miller and Lux and the distribution of the proceeds of that sale as dividends to the stockholders, is legal?

Mr. HOUGHTON: Object to that as incompetent, the records is the best evidence.

A. I think you had better repeat the latter part of that question. I am not sure that I ever understood exactly the nature of the objections which Mrs. Potter has other than the general objections she has to the amendments. She has resisted the adoption of the amendments, she has asserted that they are illegal and improper,—that is as far as I know.

Mr. PECK:

Q. You do not know the specific ground?

A. I do not know the specific grounds she has resisted them on. She first had what she got from her husband, she afterwards took up by payment of something like $100,000, other shares which Mr. Potter had hypothecated.

Q. That was after the death of Mr. Potter?

A. Yes sir.

Q. That redemption was made by her as executrix of the
220 will?

A. Yes.

Q. She presented claim against the Estate?

A. Yes.

Mr. HOUGHTON:

Q. Then I understand Mr. Nickel that the decision in the Baldwin case was addressed to Melissa Potter and that she is taking an appeal in that case?

A. Yes sir, decided against her in the Superior Court.

The witness upon reading his deposition stated that he desired to make the following corrections to his testimony:

Subsequently the laws of the State of Nevada were amended so we deemed the laws of that state most favorable under which to form a corporation, and we then decided to incorporate our corporations under the laws of that state.

J. LEROY NICKEL.

Subscribed and sworn to before me this 26th day of April, 1907.

GEO. W. CHERRY,
Special Examiner.

221 I hereby certify that the foregoing deposition of J. Leroy Nickel was taken on behalf of defendant pursuant to the Commission appointing me Special Commissioner hereunto prefixed at the place stated in the caption to said deposition at the several times set forth in said deposition in my presence and in the present of counsel for the respective parties to the cause in said caption entitled; that previous to giving his testimony the witness in said deposition named was by me duly sworn to tell the truth, the whole truth and nothing but the truth in said cause; that said deposition was taken down in short hand by me and transcribed by me pursuant to stipulation and agreement of counsel; that said deposition was subscribed in my presence by said witness, after having been read over and corrected by said deponent, and that I

have retained said deposition for the purpose of delivering the same with my own hand to the Court from which it was taken.

Accompanying said deposition and forming a part thereof are the several exhibits introduced in connection therewith and referred to and specified therein.

I further certify that I am not attorney nor counsel for any of the parties to said cause nor in any way interested in the event thereof.

In Witness Whereof, I have hereunto set my hand this 26th day of April A. D. 1907.

GEO. W. CHERRY,
Special Examiner.

Sp'l Examiner's Fees.

Seventy-eight folios at 20 cents — folio..... $15.60

GEO. W. CHERRY,
Sp'l Examiner.

222 DEFENDANT'S "EXHIBIT A." G. W. C.

This agreement, made this 12th day of June, 1905, witnesseth that:

"Miller & Lux," a corporation, organized and existing under the laws of the State of California, and the undersigned stockholders owning and holding more than two-thirds of the capital stock of said corporation, do hereby jointly and severally agree with each other and with every stockholder of said corporation who may hereafter assent to this agreement and thereby become a party thereto, as follows:

Whereas, the laws of the State of California, under which said corporation "Miller & Lux" is incorporated, are unsatisfactory in many respects, among others in that they make the stockholders personally liable for the debts of the corporation, do not give to the stockholders as perfect immunity from corporate assessments as do the laws of the State of Nevada, and in that they allow taxation on a so-called corporate franchise, although all of the property of the corporation is taxed at its full value, and although said corporation has no franchise to do anything which every natural person may not lawfully do; and,

Whereas, said laws of the State of California are in many particulars uncertain and unsettled, so that it is difficult to know with certainty what the powers and rights of the corporation, its directors and stockholders, are; and, particularly, as to dividends, a matter of the most vital importance to us, and as to which litigation is now pending and undetermined; and

Whereas, we believe that these difficulties do not exist to the same extent under the laws of the State of Nevada, and that those
223 laws are in many other respects much better adapted than the laws of the State of California to accomplish the purposes for which said corporation was formed; and

Whereas, many of the tracts of land, and many of the canals, ditches, water-rights and other rights in real property owned and held by the said corporation "Miller & Lux," extend over several counties in the State of California adjacent to one another, so that in so far as such lands, canals, ditches, water-rights and other rights in real property are situated in one county they are, under the constitution and laws of the State of California, subject to the jurisdiction of the Superior Court in and for that county, and in so far as they are situated in another county are subject to the jurisdiction of the Superior Court in and for that county, and therefore, in the event of controversies or disputes over said lands, canals, ditches, water-rights, or other rights in real property, a multiplicity of litigation may arise as it has in the past arisen, as to rights and interests of precisely the same character, in which diverse and conflicting decisions and determinations both of law and of fact, may be made, to the great injury of those interested in said lands, canals, ditches, water-rights, and other rights; and

Whereas, this result could not happen where the jurisdiction over the whole subject matter of litigation with all its collaterals would be in the same tribunal, and the rights of all parties there decided and determined, as would be the case if such litigation were in the Federal Courts; and

Whereas, we believe that our rights in litigated cases would be most fully protected and conserved in the Federal Courts to which corporations formed in other States are entitled to resort;

224 Now therefore, for the above reasons, and with a view of obtaining for ourselves and for all other stockholders of said corporation, the benefit of the laws of Nevada, which we believe give most favorable opportunities for carrying out the purposes for which said corporation was formed, we do hereby agree as follows:

1. We will at once form a corporation under the laws of the State of Nevada, under the name of "Miller & Lux, Incorporated," with an authorized capital of $12,000,000 with Articles of Incorporation in the form and containing the provisions contained in the copy of the proposed Articles of Incorporation which is hereto annexed marked "Exhibit A," and with By-Laws in the form and containing the provisions contained in the copy of the proposed By-Laws, which is hereto annexed, marked "Exhibit B," and each of the persons now members of the Board of Directors of "Miller & Lux" shall be an incorporator, and shall subscribe to two shares of the capital stock of such proposed new corporation, to be issued as fully paid up.

2. Said proposed new corporation is hereinafter referred to as the "Nevada Corporation," and said present corporation "Miller & Lux," as the "California Corporation."

3. Immediately upon the incorporation of the Nevada corporation, said Nevada corporation shall, by resolution of its board of directors entered upon its minutes assent to all the terms and provisions of, and become a party to, this agreement, and agree to carry out the same; and, immediately thereupon, all the property real and personal of the California Corporation shall be transferred and conveyed by the California Corporation to the Nevada Corporation in

consideration of the issuance by the Nevada Corporation to
225 the California Corporation of all the remainder of its capital stock, which shall be issued as fully paid up, and the assumption by the Nevada Corporation of all of the existing debts and liabilities and obligations of every kind, both legal and equitable, of the California Corporation; and the Nevada Corporation, immediately upon said transfer being made to it, shall by written agreement assume all the existing debts and liabilities and obligations of every kind, both legal and equitable, of the California Corporation.

4. When said transfer and conveyance is completed, and as soon thereafter as the law will permit, the California corporation shall be dissolved by voluntary proceedings under the Code of Civil Procedure of the State of California.

5. And, inasmuch as it cannot be known how long a time may necessarily elapse before such dissolution can be affected, and it is claimed that under the law of California, until such dissolution is completed, the stock so to be issued to the California Corporation by the Nevada Corporation in consideration of such transfer, cannot be distributed among the stockholders of the California Corporation, and, therefore, in the meantime, the voting power on said stock would be in the Board of Directors of the California Corporation and could be exercised according to the will of a majority of said Board; and, inasmuch as the present minority stockholders of the California Corporation have guaranteed to them by an agreement dated April 8th, 1897, and by the Articles of Incorporation of the California Corporation, and now possesses under said agreement and Articles of Incorporation, certain rights and privileges which it is the intention of all the parties hereto shall be preserved to said minority stockholders in the Nevada Corporation, undiminished and unimpaired, and to the same extent that they now possess said rights and privileges as stockholders in the California Corporation; and,

226 Whereas said rights and privileges so possessed by said minority stockholders of the California Corporation might be diminished or impaired or taken away if the voting power of substantially all the stock of the Nevada Corporation could be controlled as a unit by a majority of the Board of Directors of the California Corporation, or by a mere majority of the stockholders of the California Corporation; now, therefore, in consideration of the premises, and for the purpose of preserving said rights and privileges possessed by the minority stockholders of said California Corporation to them as the equitable owners of a minority of the stock of the Nevada Corporation, the legal title to which stock is to be distributed to them as soon as the California Corporation has been dissolved in accordance with the laws of California, it is agreed that, until such distribution is had, all the rights and privileges now possessed by the stockholders of the California Corporation shall be preserved to them and possessed by them as the equitable owners of the stock of the Nevada Corporation, undiminished and unimpaired and to the same extent that they possess said rights and privileges as stockholders in the California Corporation, and until

such dissolution is had and the legal title to the stock of the Nevada Corporation is distributed to said stockholders of the California Corporation, each stockholder of the California Corporation shall, as the equitable owner of stock of the Nevada Corporation, have the right to attend any and all meetings of stockholders of the Nevada Corporation and shall have the right to vote cumulatively or otherwise, and be given by the Board of Directors of the California Corporation a proxy entitling him to vote, cumulatively or
227 otherwise, the same proportionate number of shares of stock of the Nevada Corporation held by the California Corporation, as the shares of stock held by him in the California Corporation bear to the whole number of shares issued by the California Corporation, on all occasions at which stockholders of the Nevada Corporation shall have a right to vote; and the right of cumulative voting on all such occasions shall be guaranteed and preserved to said stockholders of the California Corporation as the equitable owners of the stock of the Nevada Corporation to the same extent as authorized and permitted to stockholders in and by the laws of Nevada relating to cumulative voting; and until such distribution is had, any stockholder of the California Corporation as the equitable owner of stock of the Nevada Corporation shall be eligible to be elected to the office of director thereof to the same extent as if he held the legal title to said stock.

And it is further agreed that if before such dissolution of the California Corporation is completed and before the legal title to the stock of the Nevada Corporation is distributed to the stockholders as aforesaid, any dividends are paid by the Nevada Corporation to the California Corporation as the holder of the legal title to the stock of the Nevada Corporation, such dividends shall immediately upon the receipt thereof be paid by the Directors of the California Corporation to the stockholders thereof, as the equitable owners of the stock of the Nevada Corporation.

And whereas the California Corporation is indebted to some of the parties to this agreement upon promissory notes or open account, or both, it is agreed that as soon as said transfer is made by the California Corporation to the Nevada Corporation, any party to this agreement, or anyone who may become a party thereto as
228 aforesaid, to whom any indebtedness is owing by said California Corporation, shall accept the obligation of the Nevada Corporation in lieu of that of the California Corporation, for said indebtedness, and in satisfaction and discharge thereof, and shall execute to the California Corporation a release of said indebtedness.

Any stockholder of the California Corporation may by signing this agreement, or giving his assent thereto in writing, become a party hereto, and this agreement shall inure to the benefit of every stockholder of the California Corporation, whether he sign the same or assent hereto or not.

This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto and of every person who may become a party hereto or acquire rights hereunder, and shall extend to the heirs, executors, admin-

istrators, successors and assigns of all the stockholders of the California Corporation, whether they sign or assent thereto or not.

In witness whereof, said "Miller & Lux" has caused its corporate name to be hereunto subscribed and its corporate seal to be hereunto affixed by the hands of its President and Secretary, who are thereunto duly authorized; and the undersigned have hereunto set their hands and seals the day and year first above written.

MILLER & LUX,
By HENRY MILLER, *President, and*
[CORPORATE SEAL.] DAVID BROWN, *Secretary.*
HENRY MILLER.
J. LEROY NICKEL.
EDWARD T. ALLEN.
LOUIS F. MONTEAGLE.
GUSTAV GUTSCH.
ADOLPH ROSENTHAL, *Trustee.*
THOS. B. BISHOP.
THOS. B. BISHOP &
AZRO N. LEWIS,
Trustees Estate of Miranda W. Lux.

229 EXHIBIT A.

Articles of Incorporation of Miller & Lux, Incorporated.

We, the undersigned, do hereby voluntarily associate ourselves into a corporation under the name and style of "Miller & Lux, Incorporated," and do hereby agree with each other and do certify and declare as follows:

1. That the name of said corporation shall be "Miller & Lux, Incorporated";

2. That its principal office or place of business is to be located at 116 N. Carson Street, Carson City, Ormsby County, State of Nevada; and the resident agent therein and in charge thereof is the State Agent and Transfer Syndicate, Incorporated; but an office may be maintained at number 508 California Street, in the City and County of San Francisco, State of California, or at such other place or places as may be named by its Board of Directors, or as may be fixed by the by-laws of said corporation.

3. That the object and purpose for which said corporation is formed, and the nature of the business to be transacted by it, are as follows:

To acquire all the property and assets of Miller & Lux, a corporation existing under the laws of the State of California; to annually dispose of so much of the same as, together with the earnings of said corporation for each year, will yield the sum of Three Hundred and Sixty Thousand Dollars ($360,000) for distribution among the stockholders, as provided in Subdivision Eleven (11) hereof, and to gradually dispose of the remainder of said property and assets as

speedily as, in the judgment of a majority of the Board of
230 Directors of said corporation, such disposition can fairly and advantageously be effected, and to divide the proceeds thereof among the stockholders; and, pending such disposition of said property, and solely for the purpose of avoiding depreciation in the value of said property and consequent loss, and as subsidiary to said main purpose, to carry on the business heretofore carried on by said corporation of Miller & Lux; and also, and as subsidiary to said main purpose, to carry on the business of breeding, raising, grazing, buying and selling cattle, sheep, hogs, horses and other live stock; also to carry on wholesale and retail butcher business, and to that end to slaughter cattle, sheep and hogs, conduct and maintain a refrigerator for preserving meats, acquire vehicles, and construct such buildings, structures and improvements as may be necessary or desirable in order to carry on the business of a wholesale and retail butcher; also to purchase, lease of otherwise acquire, hold, possess, use, improve, sell, or otherwise dispose of every kind of property, whether real or personal, and wheresoever situated, including stock in other corporations; also to carry on any kind of manufacturing enterprise or business; also to borrow and loan money; also to acquire water and water rights for all purposes; to promote irrigation; to construct and maintain dams, levees, weirs, canals, and do all other acts necessary to secure, impound and use water for irrigation and other purposes; also to carry on a wholesale and retail merchandise business; also to let and rent lands; also to carry on the business of farming in all of its branches; also to raise and cultivate grapes, fruit and agricultural products, and convert, sell or dispose of the same; also to locate and lay out town sites and sell the same in lots and subdivisions, or otherwise; also to have and exercise all powers, and do all acts necessary or desirable in order to carry on the business heretofore carried on by said coporation of Miller & Lux in all of its branches;

231 4. That the amount of the capital stock of said corporation shall be Twelve Millions of Dollars ($12,000,000), divided into one hundred and twenty thousand (120,000) shares of the par value of one hundred dollars ($100) each; and that the amount of its subscribed capital stock, with which it will commence business, is the sum of seven hundred dollars ($700), all of which has been actually subscribed and actually paid up;

5. That the names of each of the original subscribers to the capital stock of said corporation, and the amount subscribed by each, are as follows:

Henry Miller, one share	$100.00
Thomas B. Bishop, one share	100.00
J. Leroy Nickel, one share	100.00
Edward T. Allen, one share	100.00
Louis F. Monteagle, one share	100.00
Gustav Gutsch, one share	100.00
Azro N. Lewis, one share	100.00

6. That the period limited for the duration of the existence of said corporation is forty-two (42) years;

7. That the governing board of said corporation shall consist of seven members, who shall be styled Directors;

8. That all stock issued by said corporation shall be issued as fully paid up, and that no assessment shall ever be levied thereon, except by the unanimous vote and consent of all the Directors of this corporation; and that no vote upon that question shall be taken at any time when there is a vacancy in the Board of Directors, or when all the members of the Board are not personally present;

9. That the said corporation shall not, at any time, purchase any real property, except by the unanimous vote and consent of all the Directors of the corporation, unless such purchase be requested in writing by the holders of at least four-fifths of the issued capital stock; and that no vote upon that question shall be taken at
232 any time when there is a vacancy in the Board of Directors, or when all the members of said Board are not personally present;

10. That the proceeds of all sales or other disposition of the lands of the corporation shall, immediately after their receipt, be applied, first, to the payment and satisfaction of any debts or obligations incurred or existing on account of the purchase or purchase price of the property of the late copartnership of Miller & Lux, in the order in which such debts or obligations may become due, those nearest due to be first paid or extinguished; and, after all the debts and obligations last referred to shall have been paid or extinguished, all the proceeds of such sales on hand or thereafter made shall be considered profits and divided among the stockholders as dividends. No money received from the sale or other disposition of any of said lands shall be reinvested by the corporation except by the unanimous vote and consent of all the Directors of said corporation, and no vote upon that question shall be taken when there is a vacancy in the Board of Directors, or when all the members of said Board are not personally present;

11. That the sum of Three Hundred and Sixty Thousand Dollars ($360,000) shall be divided in money annually among the stockholders on the first day of April in each year; and, if the earnings of the corporation are at any time insufficient for the payment of that sum, the same shall be made up by sales of property.

The annual sum of One Hundred and Seventy-five Thousand Dollars ($175,000) heretofore agreed by the said corporation of Miller & Lux to be divided among the stockholders in payment of the debt or obligation incurred on account of the purchase price of the property of said late co-partnership shall, so long as the same shall be payable, be considered as a part of said sum of Three
233 Hundred and Sixty Thousand Dollars ($360,000). Said sum of Three Hundred and Sixty Thousand Dollars ($360,000) shall be payable on the 1st day of April in each year; and, if the same be not so paid, each stockholder shall have the right to maintain an action or proceeding to compel the corporation and its Directors to carry out this provision, or, at his option, any stockholder may sue to recover from the corporation, in an action or proceeding at law or in equity brought by him, such proportion of

said sum as the number of shares of stock held by him bears to the whole number of shares of stock issued by the corporation.

No part of said sum of Three Hundred and Sixty Thousand Dollars ($360,000) shall be diverted or invested by the corporation, except by the unanimous vote and consent of all the Directors of the corporation, and no vote upon that question shall be taken at any time when there is a vacancy in the Board of Directors, or when all the members of said Board are not personally present.

At any time after there shall have been received and divided among the stockholders, by this corporation and said corporation of "Miller & Lux," the sum of Two Million Dollars ($2,000,000) from sales of real property made after the first day of April, 1902, or at any time after the 6th day of February, 1908, and after said corporations shall have received and divided among the stockholders the sum of One Million Dollars ($1,000,000) from sales of real property made after the 1st day of April, 1902, then the remaining real property belonging to this corporation shall, at the option of a majority of the Board of Directors, be valued, and if the Board of Directors (all vacancies in said Board being filled and the whole Board of Directors voting) cannot unanimously agree upon such valuation, then said real property shall be appraised by the Union Trust Company of San Francisco, and thereafter the said annual payment of Three Hundred and Sixty Thousand Dollars ($360,000)
234 may, in the discretion of the Board of Directors, be reduced in the proportion which the proceeds so divided of sales of real property bears to the sum of said proceeds and the appraised value of the remaining real property.

All sums that have been received by said corporation of Miller & Lux from sales of real property made after the 1st day of April, 1902, and divided by it among its stockholders, shall be included in, and deemed to be a part of the respective sums of Two Million Dollars ($2,000,000) and One Million Dollars ($1,000,000) in this paragraph mentioned;

12. That no amendment of these Articles of Incorporation shall be had as to any of the matters mentioned in Subdivisions eight (8) to eleven (11) inclusive hereof, except by the unanimous vote and consent of all the Directors of the corporation, taken in the manner and with the limitations provided in said Subdivisions eight (8) to eleven (11) inclusive, and by the vote or written assent of stockholders representing at least four-fifths (4/5) of the capital stock of the corporation.

In witness whereof, we, the said incorporators, have hereunto set our hands, this 12th day of June, 1905.

HENRY MILLER.
THOMAS B. BISHOP.
J. LEROY NICKEL.
EDWARD T. ALLEN.
LOUIS F. MONTEAGLE.
GUSTAV GUTSCH.
AZRO N. LEWIS.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this twelfth day of June, in the year one thousand nine hundred and five, before me, George T. Knox, a Commissioner of Deeds, appointed by the government of the State of Nevada for
235 the State of California, residing in said City and County, and duly commissioned and sworn, personally appeared Henry Miller, Thomas B. Bishop, J. Leroy Nickel, Edward T. Allen, Louis F. Monteagle, Gustav Gutsch, and Azro N. Lewis, known to me to be the persons described in, whose names are subscribed to and who executed the within instrument, and who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[SEAL.] GEORGE T. KNOX,
Commissioner of Deeds for the State of Nevada.

236 (EXHIBIT B.)

By-Laws.

We, the undersigned, being the holders of all of the subscribed capital stock of Miller & Lux, Incorporated, a corporation, do hereby adopt, ordain and declare the following to be the By-Laws of said corporation:

ARTICLE I.

Office.

The corporation shall have an office at number 508 California Street, in the City and County of San Francisco, State of California, and all meetings of the stockholders or Directors shall be held at that place, and the books of said corporation shall be there kept; provided, however, that the Board of Directors shall always have power to change the office of said corporation, but notice of such change shall be at once mailed to each stockholder as herein required in case of special meetings of the stockholders.

ARTICLE II.

Stockholders' Meetings.

1. The regular annual meeting of the stockholders for the election of Directors, and for the transaction of any other business, shall be held on the second Monday of May in each year, at the hour of two (2) o'clock P. M., and notice of such annual meeting shall be given by publication for two weeks next preceding the time so fixed therefor, in the newspaper hereinafter designated, and no other notice of such annual meeting need be given.

2. Special meetings of the stockholders may be held at any time, upon the order of the Board of Directors, or upon the order of the President at the written request of stockholders holding not
237 less than one-third (⅓) of the capital stock. Notice of every such special meeting shall be given by publication for the same time and in the same manner as is required in the case of regular annual meetings, and by mailing to each stockholder holding stock upon the books of the corporation a notice of such meeting, addressed to him at his last known residence or place of business, not less than fifteen (15) days prior to the date fixed for such meeting.

Article III.

Directors' Meetings.

1. A regular meeting of the Board of Directors shall be held on the first Monday of each month, at the hour of eleven (11) o'clock A. M., and no notice of such regular meetings need be given.

2. Special meetings of the Board of Directors may be held at any time upon the call of the President, and notice shall be given of every such called meeting, by leaving a written or printed notice thereof at the last known place of business or of the residence of each Director, at least twenty-four (24) hours before the time fixed for such meeting, or by mailing to each Director to such last known place of business or residence, a similar notice, at least forty-eight (48) hours before the time fixed for such meeting.

Article IV.

Quorum.

At all meetings of the stockholders, a quorum shall consist of persons holding a majority of the subscribed capital stock, standing in their names upon the books of the corporation at least twenty (20) days prior to the date of such meeting, and at the date of such meeting.

Article V.

Proxies.

At any meeting of the stockholders, any stockholder may
238 be represented by proxy. Every proxy shall be in writing, subscribed by the holder of the stock, and attested by a witness; and shall, before the same is used, be delivered to and filed with the Secretary before the hour fixed for such meeting.

Article VI.

Directors.

1. The Directors shall be elected by ballot at the annual meeting of the stockholders, and shall hold office for one (1) year from the time of their election and until the election of their successors.

2. It shall be the duty of the Board of Directors:

First. To have the general charge and management of all the business and affairs of the corporation, and the supervision and control of every officer and employee thereof.

Second. To cause to be kept a complete record of all their proceedings and of all the proceedings of any meeting of the stockholders; and to present to the stockholders, at their regular annual meeting, or when requested by the holders of not less than one-half (½) of the subscribed capital stock, at any other time, a statement showing the assets and liabilities of the corporation, and the condition of its affairs. For the purpose of making such statement, the General Manager shall annually, and at any other time when requested by the Board of Directors, file with the Board a statement showing, as nearly as he can estimate from his knowledge and information, the number, kind, and value of the live stock and other personal property of the corporation on its ranges and ranches; and no other inventory or enumeration of such property shall ever be required

Third. To divide among the stockholders annually as dividends, such portions of the earnings and proceeds of sale of property of said corporation as are provided to be so divided in the Articles of Incorporation.

Fourth. To divide among the stockholders the cash pro-
239 ceeds of the sale of any real property, immediately after such sale, except as provided in the Articles of Incorporation.

Fifth. To perform such other duties as may be required by law or the Articles of Incorporation, or these by-laws.

3. In case of any vacancy or vacancies in the Board of Directors, due to death, resignation or removal, or to any other cause, such vacancy or vacancies shall be filled by a vote of the Board of Directors had at a regular or special meeting of the Board of Directors. Whenever there is such a vacancy or vacancies and the same has not been filled by the Board at a regular meeting held within thirty days after the occurrence of such vacancy or vacancies, and the President and the Board have failed within that time to call a special meeting of said Board for the purpose of filling such vacancy or vacancies, any member of said Board may call a special meeting for that purpose. Such call must be in writing, and addressed to the Secretary, who must thereupon give notice of the time, place, and object of the meeting, and by whose order it is called. Such notice shall be given as required by Section 2 of Article III of these By-Laws. If the Secretary refuses to give the notice, or if there is no Secretary, the call may be addressed directly to the Directors, and be served as a notice, as hereinbefore provided.

4. Each member of the Board of Directors shall receive, as compensation for his services, the sum of five (5) dollars for each meeting of the Board at which he is present.

Article VII.

Officers.

1. The officers of the corporation shall be a President, a Vice-President, a Secretary, and a Treasurer, and such other subordinate officers as may be appointed by the Board of Directors.

2. The President and Vice-president shall be, and the Secretary and the Treasurer may be, chosen from among the members of the Board of Directors; and a corporation may be appointed Treasurer.

3. Every officer of the corporation, except Directors, shall
240 be elected by the Board of Directors, and hold office at the pleasure of the Board of Directors; and his compensation shall, from time to time, be fixed by said Board; provided, that the compensation of the President shall not exceed twenty-five thousand dollars ($25,000) per annum.

4. The Board of Directors may require any officer to give bond for the faithful performance of his duties, in such amount and with such sureties as the Board may order.

Article VIII.

President.

The President shall have the general management of the business of the corporation, and shall be the General Manager. As General Manager he may appoint and remove, at his pleasure, any and all employees of the corporation, and fix their compensation. In all said matters he shall, however, be subject to the control of the Board of Directors, and shall obey all lawful orders or resolutions by them adopted.

2. The President shall preside over all meetings of the stockholders and Directors; provided, however, that he may request any member of the Board of Directors to preside over any of such meetings in his place when he is present at such meeting.

3. The President shall sign all certificates of stock, and all contracts or other instruments in writing necessary and proper in the transaction of the business of the corporation, or when ordered so to do by the Board of Directors.

4. The President may call a special meeting of the Directors at any time when he deems it necessary, and shall do so whenever requested by two Directors.

Article IX.

Vice-President.

In case the President shall at any time be unable to act, or during any vacancy in the office of the President, the Vice-President shall perform the duties of President; and if, at any time, both the
241 President and Vice-President shall be absent or unable to act, or if there be a vacancy in both of said offices, the Board of Directors may appoint a member of the Board President *pro tem.*, who shall perform, for the time being, the duties of President; provided, that the Vice-President shall perform the duties of the President (except as to the general management), whenever the President is absent from the City and County of San Francisco.

ARTICLE X.

Secretary.

It shall be the duty of the Secretary:

1. To keep a record of the proceedings of the Board of Directors and of the stockholders.

2. To keep the corporate seal of the corporation, and affix the same to all instruments when ordered so to do by the Board of Directors.

3. To keep all the books of account of the corporation, and to keep the stock, transfer and by-law books, and such other books as may, by law or by the Board of Directors, be required to be kept.

4. He shall keep the book of certificates of stock, fill up and countersign all certificates issued, and make the proper entries of such issue and of the surrender of any certificate in the books kept for that purpose.

5. He shall serve all notices required by law, or by these by-laws, or by any order of the Board of Directors to be served; and, in case of his absence, inability, refusal, or neglect to serve any such notice, the same may be served by any person thereunto directed by the President, Vice-President, or President *pro tem.*

242 6. The Secretary, or any other person serving any notice as above directed, shall make a certificate of the service thereof, stating in detail the time and manner of such service, which certificate shall be entered at large upon the minutes of the Board of Directors; and such minutes, after having been read and approved at a subsequent meeting of the Board, shall be sufficient evidence of the due service of such notice.

7. The secretary shall perform such other duties as may be required by law, or by these by-laws, or by any order of the Board of Directors.

ARTICLE XI.

Treasurer.

The Treasurer shall receive and safely keep all the moneys of the corporation, and shall pay them out only upon the check of the President or of some other officer or employee of the corporation who shall have been authorized to sign such check by a resolution of the Board of Directors entered upon its minutes.

ARTICLE XII.

Stock.

1. Every certificate of stock shall express on its face that the stock represented thereby is fully paid up, and such certificates shall be issued when the Board of Directors shall so order. Each certificate shall express on its face its number, date of issuance, and the number

of shares for which, and the person to whom, the same is issued. The book of certificates of stock shall contain a margin, on which shall be entered the number, date, number of shares, and the name of the person expressed in the corresponding certificate; and if such certificate is issued in place of and upon the surrender of a certificate previously issued, on such margin shall also be entered the number of the certificate in place of which the same is issued. Every surrendered certificate of stock shall be canceled and permanently fastened by the Secretary in the certificate book at the place from which it was originally taken.

243 2. No certificate of stock shall be issued until any former certificate for the same has been surrendered and canceled, unless such former certificate shall have been lost or destroyed, in which case the Board of Directors may order a new certificate to be issued, upon the giving of such reasonable security as may be required by the board

ARTICLE XIII.

Seal.

Said corporation shall have a common seal, containing the name of the corporation, and the date of its incorporation, together with such other device as may be ordered by the Board of Directors.

ARTICLE XIV.

Notices.

1. All notices of meetings of the stockholders or Board of Directors, required by law, or by these by-laws, or by any order of the Board of Directors, to be published, and all other notices so required to be published, shall be published in "The Bulletin," a newspaper published in the City and County of San Francisco, State of California; and it shall not be necessary in any case, in directing any such publication, for the Board of Directors to specify such newspaper.

2. Any stockholder or director may file with the Secretary a designation of a particular place or address for the service of notices upon him, and may change or revoke such designation at his pleasure; and all notices to him shall be delivered at that place*d*, or mailed (when mailing is allowed) to that address.

3. Whenever all the persons entitled to vote at any meeting, whether of Directors or stockholders, consent to such meeting, either by a writing on the records of the meeting or by a writing filed with the Secretary, the doings of such meeting shall be as valid as

244 if had at a meeting regularly called and noticed; and at such meeting any business may be transacted which is not expressly excepted from such written consent.

If any meeting be held without proper calling or notice, and without such written consent, and a quorum is present and acting at such

meeting, the proceedings of such meeting may be thereafter ratified and approved, and such objections thereto waived, by a writing signed by all the persons having the right to vote at such meeting, filed with the Secretary; and upon such filing the proceedings at such meeting shall be deemed as valid as if such meeting had been duly called and noticed.

Any written consent or ratification herein provided for may be given and signed by proxy or power of attorney filed with the Secretary.

(Endorsed:) Agreement. Miller & Lux with Certain Stockholders. Dated June 12, 1905.

245 DEFENDANT'S "EXHIBIT B." G. W. C.

On 5th. June 1905 the President made the following written order to the Secretary:

"Please call a special meeting of the Board of Directors of Miller & Lux to be held on Wednesday, the 7th inst., at 2:30 o'clock P. M."

In accordance with said order the Secretary issued the following notice:

"A special meeting of the Board of Directors of Miller & Lux will be held at the office of the Corporation, 508 California Street, San Francisco, Cal., on Wednesday, the 7th inst., at 2:30 o'clock P. M. By order of the President."

I certify that I delivered typewritten copies of the foregoing notice prior to the hour of noon on 5th June 1905, addressed as follows:

E. T. Allen, Esq., 314 Market St., San Francisco.
Thomas B. Bishop, Esq., 532 Market St., San Francisco.
G. Gutsch, Esq., 503 California St., San Francisco.
A. N. Lewis, Esq., 532 Market St., San Francisco.
Henry Miller, Esq., 508 California St., San Francisco.
Louis F. Monteagle, Esq., 530 California St., San Francisco.
J. Leroy Nickel, Esq., 508 California St., San Francisco.

DAVID BROWN, *Secretary.*

Directors' Meeting.

A special meeting of the Board of Directors of Miller & Lux was held at the office of the Corporation, No. 508 California St., San Francisco, Cal., on 7th June 1905, at 2:30 o'clock P. M., all the Directors being present.

At the request of the President, Director Bishop presided.

* * * * * * *

Thereupon, on motion duly seconded, the meeting ad-
246 journed until Monday the 12th inst., at noon.

DAVID BROWN, *Secretary.*

Directors' Meeting.

A meeting of the Board of Directors of Miller & Lux was held at the office of the Corporation, 508 California Street, San Francisco, Cal., on 12th. June 1905, at noon, all the Directors being present.

At the request of the President, Director Bishop presided.

On motion of Director Allen, seconded by Director Lewis, and unanimously adopted, the President and Secretary were authorized and directed in the name of this corporation and under its corporate seal to execute that certain Agreement endorsed "Agreement for re-incorporation between Miller & Lux and Stockholders, dated June 12, 1905."

Thereupon, on motion duly seconded, the meeting adjourned until Wednesday, the 14th. inst. at 1:15 o'clock P. M.

DAVID BROWN, *Secretary.*

Directors' Meeting.

A meeting of the Board of Directors of Miller & Lux was held at the office of the Corporation, 508 California St., San Francisco, Cal., on 14th June 1905, at 1:15 o'clock P. M., all the Directors being present.

At the request of the President, Director Bishop presided.

On motion of Director Gutsch seconded by Director Allen,
247 the following resolution was adopted by a unanimous vote:

Be it resolved by the Board of Directors of "Miller & Lux", a corporation under the laws of the State of California, that this Corporation do sell, transfer, and convey all its property, real and personal, to "Miller & Lux, Incorporated", a corporation under the laws of the State of Nevada, in consideration of the issuance to this Corporation of 119,986 shares of the capital stock of said Corporation of "Miller & Lux, Incorporated", to be issued as fully paid up shares, and the assumption by said last named Corporation of all the debts and liabilities of this Corporation existing at the date of such transfer; and the President and Secretary are hereby authorized and directed to make, execute, acknowledge, and deliver the deeds of this Corporation conveying said property accordingly.

* * * * * * *

Thereupon, on motion duly seconded, the meeting adjourned.

DAVID BROWN, *Secretary.*

(Endorsed:) Miller & Lux (a corporation). Defendant's "Exhibit B."

248 DEFENDANT'S "EXHIBIT C." G. W. C.

Articles of Incorporation and By-laws of Miller & Lux, with Preliminary Agreement.

James H. Barry, Printer, 429 Montgomery St., S. F.

249 DEFENDANT'S EXHIBIT C."

250 *Articles of Incorporation and By-laws of Miller & Lux, with Preliminary Agreement.*

James H. Barry, Printer, 429 Montgomery St., S. F.

251 *Agreement.*

This agreement made this 8th day of April, 1897, between Henry Miller, the party of the first part; and Henry Lux; Philip Lux; Barbara Lux; Henry Rochrig, Senior, formerly the husband of Dorothea Rochrig, (formerly Dorothea Lux,) now deceased; Henry Rochrig, Junior, son of said Dorothea Rochrig, deceased; Dorothea Rott, formerly Dorothea Rochrig, daughter of said Dorothea Rochrig, deceased; Henry Lux, as administrator of the estate of said Dorothea Rochrig, deceased; Salmome Lux Wolf, formerly Salome Lux, daughter of George Lux, deceased; Carolina Lux Michel, formerly Caroline Lux, daughter of said George Lux, deceased; Emil Lux, a minor, son of said George Lux, deceased; George Lux, a minor, son of said George Lux, deceased; Henry Lux, as guardian of the estates of said Emil Lux and George Lux, minors; Henry Lux, as administrator of the estate of said George Lux, deceased; and Jesse S. Potter, as trustee under the last will and testament of Charles Lux, deceased, for the benefit of said Henry Lux and his children, Charles Henry Lux, Lena Lux MacBride, and Lizzie M. Potts; the parties of the second part; and Thomas B. Bishop and Azro N. Lewis, executors of and trustees under the last will and testament of Miranda W. Lux, deceased, the parties of the third part; and Jesse S. Potter, executor of the last will and testament of Charles Lux, deceased, the party of the fourth part; and Jesse S. Potter, as sole heir at law of Miranda W. Lux, deceased, the party of the fifth part; witnesseth:

Whereas, the said party of the first part, and one Charles Lux were partners, doing business in the City and County of San Francisco, State of California, and elsewhere, under the firm
252 name and style of Miller & Lux; the said party of the first part and the said Charles Lux being equal partners therein;

And whereas, on the 15th day of March, 1887, the said Charles Lux died, leaving a last will and testament which was admitted to probate by the Superior Court of the County of San Mateo, State of California, in which Court administration on his estate is now pending, and of which will the said party of the fourth part is now the sole surviving executor;

And whereas, the said Charles Lux, deceased, left surviving him his wife, Miranda W. Lux, and by his said will declared that all his property, except certain property not involved in this agreement, was the community property of himself and his said wife, and confirmed to her the one-half of the said community property, and did devise and bequeath to certain of the said parties of the second part, and to other persons of whom others of the said parties of the second part are the successors in interest, all the rest and residue of his estate, after the payment of certain legacies in said will contained; and the said parties of the second part are entitled to a distribution to them of all the said residue of said estate;

And whereas, on the twentieth day of September, 1894, the said Miranda W. Lux died, leaving a last will and testament which was admitted to probate by the Superior Court of the City and County of San Francisco, State of California, in which Court administration on her estate is now pending; and the said parties of the third part are the executors of said will;

And whereas, a contest was duly brought and instituted by said party of the fifth part to revoke the probate of said will, which contest is still pending and undetermined;

And whereas, said parties of the third and fifth parts propose to finally settle and determine said contest and obtain a distribution of the property of said estate in conformity with the terms of this agreement;

253 And whereas, by the said will, the said Miranda W. Lux devised and bequeathed to the said parties of the third part all of her estate, in trust for certain uses and purposes in said will set forth and declared;

And whereas, since the death of the said Charles Lux, the said party of the first part has continued in the possession of all the property and assets of the said firm of Miller & Lux, and has continued to carry on, and is now carrying on the business of said firm, under the firm name aforesaid, and has not liquidated the said business, except by the conveyance of certain lands to the estate of said Charles Lux, under an agreement, dated June 16th 1893, and filed in the suit of Potter *v.* Miller, hereinafter mentioned, for the division of certain lands belonging to said Miller & Lux, and by the payment to the estate of the said Charles Lux, deceased, of certain sums of money as dividends in liquidation;

And whereas, the property of said firm is of very great extent, and consists of very large amounts of both real and personal property, situated in the States of California, Oregon and Nevada, and, for various causes, it has been and is impracticable to sell the said property to any considerable extent, or to liquidate and close the said partnership business;

And whereas an accounting has been had between the party of the first part on the one hand, and the other parties hereto on the other

hand, of and concerning the transactions of the said party of the first part, as surviving partner as aforesaid; in which accounting certain errors and omissions have been discovered in the accounts of the party of the first part as such surviving partner, which have been corrected by him; and it has been found and is now agreed between all the parties hereto, that, on the 30th day of September, 1896, there was due from the said copartnership to the said party of the first part the sum of one hundred and twenty-five thousand and twenty-seven and seventy-five hundredths dollars ($125,027.75), and no more;

And whereas the parties hereto are desirous of settling and liquidating the said business and of selling all the property of said late copartnership, and converting the same into money,
254 and dividing the same between the parties hereto in proportion to their respective interests; but, owing to the long continued depression in business and the great amount of property owned by said partnership, and the complicated nature of the business thereof, it will probably require an extended period to complete such liquidation; during which period it will be necessary, in order to prevent depreciation of the said property and other losses, to continue to carry on the business of the said late partnership;

Now therefore, for the purpose of carrying out the objects aforesaid, the parties hereto do hereby covenant and agree each with the others:

I.

That the parties hereto shall cause to be formed under the laws of the State of California, a corporation, under the name and style of Miller & Lux, for the purpose of acquiring the property of the said late firm of Miller & Lux, and of gradually disposing of the same as speedily as, in the judgment of a majority of the Board of Directors of said corporation, such disposition can fairly and advantageously be effected, and of dividing the proceeds thereof among the stockholders; and in the meantime, and solely for the purpose of avoiding depreciation in the value of said property and consequent loss, the said corporation shall, as subsidiary to said main purpose, carry on the said business of the said late copartnership.

In the articles of incorporation of said corporation, it shall, among other things, be provided:

1. That the name of said corporation shall be "Miller & Lux";

2. That the purpose for which said corporation is formed is to acquire all the property and assets of the said late firm of Miller & Lux, and to gradually dispose of the same as speedily as, in the judgment of a majority of the Board of Directors of said
255 corporation, such disposition can fairly and advantageously be effected, and to divide the proceeds thereof among the stockholders; and, pending such disposition of said property, and solely for the purpose of avoiding depreciation in the value of said

property and consequent loss, and as subsidiary to said main purpose, to carry on the business of the said late copartnership; and also, and subsidiary to said main purpose, to carry on the business of breeding, raising, grazing, buying and selling cattle, sheep, hogs, horses and other live stock; also to carry on wholesale and retail butcher business, and to that end to slaughter cattle, sheep and hogs, conduct and maintain a refrigerator for preserving meats, acquire vehicles, and construct such buildings, structures and improvements as may be necessary or desirable in order to carry on the business of a wholesale and retail butcher; also to purchase, lease or otherwise acquire, hold, possess, use, improve, sell or otherwise dispose of every kind of property, whether real or personal, and wheresoever situated, including stock in other corporations; also carry on any kind of manufacturing enterprise or business; also to borrow and loan money; also to acquire water and water rights for all purposes; to promote irrigation; to construct and maintain dams, levees, weirs, canals, and do all other acts necessary to secure, impound and use water for irrigation and other purposes; also to carry on a wholesale and retail merchandise business; also to let and rent lands; also to carry on the business of farming in all of its branches; also to raise and cultivate grapes, fruit and agricultural products and convert, sell or dispose of the same; also to locate and lay out town sites and sell the same in lots and subdivisions or otherwise; also to have and exercise all powers and do all acts necessary or desirable in order to carry on the business heretofore carried on by said firm of Miller & Lux in all of its branches.

256 3. That the place where the principal business of said corporation is to be transacted shall be the City and County of San Francisco, State of California.

4. That the term for which said corporation is to exist is fifty years.

5. That the number of directors shall be seven.

6. That the amount of the capital stock of said corporation shall be twelve millions of dollars ($12,000,000) divided into one hundred and twenty thousand (120,000) shares of the par value of one hundred dollars ($100) each.

7. That all stock issued by said corporation shall be deemed fully paid up, and that no assessment shall ever be levied thereon, except by the unanimous vote and consent of all the directors of the corporation; and that no vote upon that question shall be taken at any time when there is a vacancy in the Board of Directors, or when all the members of the Board are not personally present.

8. That the said corporation shall not, at any time, purchase any real property, nor increase the aggregate amount on hand at the time that said corporation shall acquire the property of said late firm of Miller & Lux, except by the unanimous vote and consent of all the directors of the corporation, unless such purchase be requested in writing by the holders of at least four-fifths of the issued capital

stock; and that no vote upon that question shall be taken at any time when there is a vacancy in the Board of Directors or when all the members of said Board are not personally present.

9. That the proceeds of all sales or other disposition of the lands of the corporation shall, immediately after their receipt, and after the payment of all outstanding current debts of the corporation, be applied, first, to the payment and satisfaction of any debts
257 or obligations incurred or existing on account of the purchase price of the property of said late copartnership in the order in which such debts or obligations may become due, those nearest due to be first paid or extinguished; and, after all the debts and obligations last referred to shall have been paid or extinguished, all the proceeds of such sales on hand or thereafter made shall be considered profits and divided among the stockholders as dividends. No money received from the sale or other disposition of any of said lands shall be reinvested by the corporation, except by the unanimous vote and consent of all of the directors of said corporation, and no vote upon that question shall be taken when there is a vacancy in the Board of Directors, or when all the members of said Board are not personally present.

10. That the net profits of the corporation shall be divided in money, at least annually, among the stockholders, as dividends, and that no part thereof shall be diverted or invested by the corporation, except by the unanimous vote and consent of all the directors of the corporation; and that no vote upon that question shall be taken at any time when there is a vacancy in the Board of Directors, or when all the members of said Board are not personally present; provided, that the Board of Directors may retain on hand out of said net profits, at the time of the declaration of any dividend, not to exceed fifty thousand dollars ($50,000), to meet the future expenses of the business.

11. That no director shall be competent to vote upon any of the questions mentioned in subdivisions seven (7) to ten (10) inclusive hereof, unless he be a director elected by the stockholders at the regular annual meeting.

258 12. That no amendment of the said articles of incorporation shall be had as to any of the matters mentioned in subdivisions seven (7) to eleven (11) inclusive hereof, except by the unanimous vote and consent of all the directors of the corporation, taken in the manner and with the limitations provided in said subdivisions seven (7) to eleven (11) inclusive, and by the vote or written assent of stockholders representing at least four-fifths (4/5) of the capital stock of the corporation.

II.

That, for the purpose of forming said corporation, the said party of the first part shall subscribe for two shares of the capital stock thereof, and three other persons, to be named by him, shall each

subscribe for two shares of said capital stock, and one person named by the parties of the second part shall subscribe for two shares of said capital stock, and one person to be named by the parties of the third part shall subscribe for two shares of said capital stock, and one person to be named by the parties of the second and third parts jointly, shall subscribe for two shares of said capital stock; and the said persons shall subscribe and acknowledge the said articles of incorporation, and shall be the directors of said corporation for the first year; that is, until their successors are elected at the first regular annual meeting.

The aforesaid subscriptions of fourteen shares of the said capital stock shall be deemed to have been made for and on account of the purchase of the property of said late firm of Miller & Lux, as hereinafter provided, and shall be a part of the consideration for such purchase as hereinafter mentioned.

III.

The said party of the first part shall, so long as he is able to perform the duties of such position, be the President and General Manager of said corporation; and for his services in that be-
259 half he shall receive such compensation as the Board of Directors may fix from time to time, not exceeding the sum of twenty-five thousand dollars ($25,000) per annum.

IV.

That as soon as said corporation shall have been formed and organized, the parties hereto of the second, third, fourth and fifth parts, shall procure an order from the Superior Court of the County of San Mateo in the matter of said estate of Charles Lux, ratifying and approving the settlement of the accounts of said party of the first part hereby made, and authorizing and directing the said party of the fourth part to consent to a final judgment and decree in favor of said Henry Miller, in the suit of Jesse S. Potter, *et al.*, *vs.* Henry Miller, *et al.*, No. 27,133, in the Superior Court of the City and County of San Francisco, State of California, in accordance with this agreement, and refusing any other relief and awarding no costs.

That said parties hereto shall thereupon obtain a final judgment and decree to be given and entered in favor of said Henry Miller, in said suit of Potter *v.* Miller, ratifying, approving and confirming all of his acts as such surviving partner, and accepting, ratifying and approving all purchases of real and other property made by him, and settling, approving and ratifying the accounts and books kept by him, as such surviving partner, in all particulars, and decreeing that said accounts and books are correct, and that in all respects said Henry Miller has accounted fully for each, every and all of the money, property and assets of said late copartnership, and that there was, on the said 30th day of September, 1896, due from said late copartnership to said Henry Miller, the sum of one hundred and twenty-five thousand and twenty-seven and seventy-five hundredths

dollars ($125,027.75); that, in addition to said sum, said Henry Miller is the owner of one undivided one-half of all the property and assets of said late copartnership; and that the estate of the said Charles Lux, deceased, is the owner of the other undivided one-half thereof.

260 V.

That, as soon as said final judgment and decree shall have been given and entered in favor of said Henry Miller as aforesaid, the parties hereto shall, by good and sufficient deeds of grant, bargain and sale, executed by them respectively, grant, convey, assign and transfer to said corporation all of their and each of their right, title and interest in and to all the property, assets and effects of said late copartnership of Miller & Lux; excepting, however, and excluding from said conveyances all of the real property formerly belonging to said copartnership, which has been partitioned and divided between the party of the first part and the estate of said Charles Lux, deceased, in said suit of Potter *v.* Miller.

The said conveyances will each be made upon and subject to the express condition that the said corporation shall continue to be governed in all respects by the articles of incorporation under which it was formed, as aforesaid, and that, if at any time said articles of incorporation shall, in any respect, except as provided in subdivision twelve (12) or paragraph one (1) of this agreement, be changed or altered, or the said corporation shall otherwise cease to be governed and controlled by said original articles, then, in that event, all of the property so conveyed and then remaining unsold shall revert to and vest in the grantors in said respective conveyances, their heirs and assigns; and all persons holding stock of said corporation derived from said respective grantors shall be deemed to be assigns of said grantors respectively within the meaning of said condition, and in case of such reversion, each share of the stock of said corporation shall carry with it and vest the ownership of one undivided one hundred and twenty thousandth (1-120,000) part of all the assets and property of the corporation in the holder thereof; and said conveyances shall contain a suitable clause conferring a right of re-entry for breach of said conditions;
261 provided, however, and it shall be so stated in said conveyances, that a breach of such conditions shall cause the reversion and right of re-entry aforesaid only as to such property as shall not theretofore have been sold or otherwise disposed of to other persons by said corporation.

The consideration for said conveyances shall be the capital stock of said corporation in the following proportions: one-half thereof, including eight of the subscribed shares heretofore mentioned, to the said party of the first part; one-fourth thereof, including three of said subscribed shares, to the said parties of the second part; and one-fourth thereof, including three of said subscribed shares, to the said parties of the third part; and also the sum of one million, seven hundred and fifty thousand dollars ($1,750,000)

to be paid to said parties or their assigns in the proportions aforesaid, in ten equal annual installments of one hundred and seventy-five thousand dollars ($175,000) each; and the said corporation shall, upon receiving the said deeds of conveyance, issue and deliver to said parties respectively certificates for their said respective amounts of said capital stock, and shall also, at the same time, make, execute and deliver to said parties an agreement that it will in each year for ten years, pay to the holder of each share of said stock, the sum of one dollar, forty-five and five-sixth- cents ($1.45 5-6), until the said sum of one million seven hundred and fifty thousand dollars ($1,750,000) has been fully paid.

It shall be provided, however, in said agreement, that said corporation shall have the option of paying off any or all of such installments before they become due; and provided further, that the transfer upon the books of any share of stock shall be deemed an assignment of a proportionate part of said sum of one million seven hundred and fifty thousand dollars ($1,750,000), and only the holders of shares of stock on the books of said corporation shall be entitled to shares in said sum when the same or any installment thereof is paid.

262 Neither said sum of one million seven hundred and fifty thousand dollars ($1,750,000), nor any installment thereof shall ever bear any interest before maturity

The said corporation shall also, as a part of said consideration, assume and undertake to pay and discharge all the obligations, debts, liabilities, and demands, of every kind and nature whatsoever, then existing against the said late copartnership of Miller & Lux or against the said party of the first part as surviving partner of said late copartnership.

VI.

That the said parties of the second, third, fourth and fifth parts, shall procure from the said Superior Court of the County of San Mateo a final decree of distribution in the matter of the estate of said Charles Lux, deceased, distributing to said corporation all of the property so conveyed to it as aforesaid, and the said parties of the third and fifth parts shall thereupon and thereafter procure from the said Superior Court of the City and County of San Francisco, a decree of distribution in the matter of the estate of the said Miranda W. Lux, deceased, distributing to said corporation all of the property so conveyed to it as aforesaid and ratifying and approving the conveyances so made by the parties of the third part hereto.

VII.

That said corporation shall lease from the party of the first part for five years those certain lands owned by the party of the first part near the town of Gilroy, Santa Clara County, California, and constituting all of the private lands of the said party of the first part included in what is commonly known and called "Bloomfield Farm,

except "Mount Madonna," the "Lewis Place," and the "Legler Place," so called, and containing twelve thousand five hundred and seventy-eight and fifty-two hundredths (12,578.52) acres, at the agreed rental of two dollars and fifty cents ($2.50) per acre
263 per annum; and also the said "Lewis" and "Legler" places, containing two thousand one hundred and eighteen and sixty-seven hundredths (2,118.67) acres, at the agreed gross rental of five hundred and fifty dollars ($550.00) per annum; the said corporation to pay all the taxes on said "Lewis" and "Legler" places during said lease, and to have the privilege of a renewal of said lease for the further term of five years at the same rates of rental.

VIII.

That immediately upon the issuance of the stock of said corporation, the said parties of the second and third parts shall and will each sell, assign and transfer to the said party of the first part three shares of the said capital stock so issued to them respectively, for the sum and price of one hundred dollars ($100.00) per share, to be paid to them respectively by the said party of the first part therefor.

IX.

In case, for any reason, either of the Courts hereinbefore mentioned should refuse to make and enter either of the decrees of distribution hereinbefore provided for, or in case either of said decrees of distribution should be finally reversed on appeal, or otherwise vacated or annulled, then and in that event, the property conveyed by the parties hereto to the said corporation shall immediately revert to the grantors in said conveyances respectively and their respective heirs and assigns; and all persons holding stock of said corporation, derived from said respective grantors, shall be deemed to be assigns of said grantors respectively within the meaning of this condition; and in case of such reversion, each share of the stock of said corporation shall carry with it and vest the ownership of one undivided one hundred and twenty thousandth (1-120,000) part of all the assets and property of the corporation in the holder thereof, in like manner as upon a breach of the conditions mentioned in paragraph five (V) hereof; and said conveyances shall contain the foregoing condition and a suitable clause conferring a right of re-entry for breach thereof.
264 In the event that the said property shall revert at any time as in this paragraph provided, then all judgments, orders, decrees and proceedings of every kind, which may have been had or taken pursuant to this agreement, shall be vacated and set aside, and all the parties hereto shall be restored to and placed back in the same legal position in all respects as to each other, as they have and occupy at the time of the execution hereof, anything in this agreement to the contrary notwithstanding. Provided that a transferee of stock shall, as to all property rights, stand in the shoes of his transferor.

In witness hereof the said parties hereto have subscribed this instrument in quintuplicate the day and year first above written.

HENRY MILLER.
HENRY LUX.
PHILIP LUX.
By HENRY LUX,
His Attorney in Fact.
BARBARA LUX.
By HENRY LUX,
Her Attorney in Fact.
HENRY ROEHRIG, SENIOR.
By HENRY LUX,
His Attorney in Fact.
HENRY ROEHRIG, JUNIOR.
By HENRY LUX,
His Attorney in Fact.
DOROTHEA ROTT.
By HENRY LUX,
Her Attorney in Fact.
SALOME LUX WOLF.
By HENRY LUX,
Her Attorney in Fact.
CAROLINE LUX MICHEL.
By HENRY LUX,
Her Attorney in Fact.
HENRY LUX,
Administrator of the Estate of
Dorothea Roehrig, Deceased.
EMIL LUX,
By HENRY LUX, *His Guardian.*
265 GEORGE LUX,
By HENRY LUX, *His Guardian.*
HENRY LUX,
Guardian of the Estates of Emil Lux
and George Lux, Minors.
HENRY LUX,
Administrator of the Estate of
George Lux, Deceased.
JESSE S. POTTER,
Trustee under the Last Will and Testament
of Charles Lux, Deceased.
JESSE S. POTTER,
Executor of the Last Will and Testament
of Charles Lux, Deceased.
JESSE S. POTTER.
THOMAS B. BISHOP.
AZRO N. LEWIS.
Executors of and Trustees under the
Last Will and Testament of
Miranda W. Lux, Deceased.

We, the beneficiaries under the trusts declared by the last will and testament of Charles Lux, deceased, of which Jesse S. Potter is the trustee, do hereby assent to and join in the foregoing agreement.

CHARLES HENRY LUX.
MARGUERITE LUX.
Wife of Charles Henry Lux.
LENA LUX MacBRIDE.
LIZZIE M. POTT.
HENRY LUX.

266 DEFENDANT'S "EXHIBIT D." G. W. C.

Articles of Incorporation of Miller & Lux.

We, the undersigned residents of the State of California, do hereby associate ourselves into a corporation under the name and style of "Miller & Lux," and do hereby agree with each other and do certify and declare as follows:

1. That the name of said corporation shall be "Miller & Lux";

2. That the purpose for which said corporation is formed is to acquire all the property and assets of the late firm of Miller & Lux, and to gradually dispose of the same as speedily as, in the judgment of a majority of the Board of Directors of said corporation, such disposition can fairly and advantageously be effected, and to divide the proceeds thereof among the stockholders; and, pending such disposition of said property, and solely for the purpose of avoiding depreciation in the value of said property and consequent loss, and as subsidiary to said main purpose, to carry on the business of the said late copartnership; and also, and as subsidiary to said main purpose, to carry on the business of breeding, raising, grazing, buying and selling cattle, sheep, hogs, horses and other live stock; also to carry on wholesale and retail butcher business, and to that end slaughter cattle, sheep and hogs, conduct and maintain a refrigerator for preserving meats, acquire vehicles, and construct such buildings, structures and improvements as may be necessary or desirable in order to carry on the business of a wholesale and retail butcher; also to purchase, lease or otherwise acquire, hold, possess,
267 use, improve, sell or otherwise dispose of every kind of property, whether real or personal, and wheresoever situated, including stock in other corporations; also to carry on any kind of manufacturing enterprise or business; also to borrow and loan money; also to acquire water and water rights for all purposes; to promote irrigation; to construct and maintain dams, levees, weirs, canals, and do all other acts necessary to secure, impound and use water for irrigation and other purposes; also to carry on a wholesale and retail merchandise business; also to let and rent lands; also to carry on the business of farming in all its branches; also to raise and cultivate grapes, fruit and agricultural products, and convert, sell or dispose of the same; also to locate and lay out town sites and sell

the same in lots and subdivisions or otherwise; also to have and exercise all powers and do all acts necessary or desirable in order to carry on the business heretofore carried on by said firm of Miller & Lux in all of its branches;

3. That the place where the principal business of said corporation is to be transacted shall be the City and County of San Francisco, State of California;

4. That the term for which said corporation is to exist is fifty years;

5. That the number of its directors shall be seven (7); and the following are the names and residences of those who are appointed as such directors for the first year, that is, until their successors are elected at the first regular annual meeting:

Henry Miller,	residing	at	San Francisco,	California.
Henry Lux,	"	at	San Jose,	"
Thomas B. Bishop,	"	at	San Francisco,	"
J. Leroy Nickel,	"	"	"	"

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Edward T. Allen,	residing	at	San Francisco,	California.
Jesse S. Potter,	"	"	"	"
Azro N. Lewis	"	"	Alameda,	"

6. That the amount of capital stock of said corporation shall be twelve millions of dollars ($12,000,000) divided into one hundred and twenty thousand (120,000) shares of the par value of one hundred dollars ($100) each; of which amount fourteen (14) shares have been actually subscribed by the following named persons:

Henry Miller	2	shares.
Henry Lux	2	"
Thomas B. Bishop	2	"
J. Leroy Nickel	2	"
Edward T. Allen	2	"
Jesse S. Potter	2	"
Azro N. Lewis	2	"

7. That all stock issued by said corporation shall be deemed fully paid up, and that no assessment shall ever be levied thereon, except by the unanimous vote and consent of all the directors of the corporation; and that no vote upon that question shall be taken at any time when there is a vacancy in the Board of Directors, or when all the members of the Board are not personally present;

8. That said corporation shall not, at any time, purchase any real property, nor increase the personal property of the corporation above the aggregate amount on hand at the time that said corporation shall acquire the property of said late firm of Miller & Lux, except by the unanimous vote and consent of all the directors of the corporation, unless such purchase be requested in writing by
269 the holders of at least four-fifths of the issued capital stock; and that no vote upon that question shall be taken at any

time when there is a vacancy in the Board of Directors or when all the members of said Board are not personally present;

9. That the proceeds of all sales or other disposition of the lands of the corporation shall, immediately after their receipt, and after the payment of all outstanding current debts of the corporation, be applied, first, to the payment and satisfaction of any debts or obligations incurred or existing on account of the purchase or purchase price of the property of said late copartnership in the order in which such debts or obligations may become due, those nearest due to be first paid or extinguished; and, after all the debts and obligations last referred to shall have been paid or extinguished, all the proceeds of such sales on hand or thereafter made shall be considered profits and divided among the stockholders as dividends. No money received from the sale or other disposition of any of said lands shall be reinvested by the corporation, except by the unanimous vote and consent of all the directors of said corporation, and no vote upon that question shall be taken when there is a vacancy in the Board of Directors, or when all the members of said Board are not personally present;

10. That the net profits of the corporation shall be divided in money, at least annually, among the stockholders, as dividends, and that no part thereof shall be diverted or invested by the corporation, except by the unanimous vote and consent of all the directors of the corporation, and that no vote upon that question shall be taken at any time when there is a vacancy in the Board of Directors, or when all the members of said Board are not personally present;
270 Provided, that the Board of Directors may retain on hand, out of said net profits, at the time of the declaration of any dividend, not to exceed fifty thousand dollars ($50,000) to meet the future expenses of the business;

11. That no director shall be competent to vote upon any of the questions mentioned in subdivision seven (7) to ten (10) inclusive hereof, unless he be a director elected by the stockholders at the regular annual meeting;

12. That no amendment of these articles of incorporation shall be had as to any of the matters mentioned in subdivisions seven (7) to eleven (11) inclusive hereof, except by the unanimous vote and consent of all the directors of the corporation, taken in the manner and with the limitations provided in said subdivisions seven (7) to eleven (11) inclusive, and by the vote or written assent of stockholders representing at least four-fifths (4/5) of the capital stock of the corporation.

In witness whereof, we have hereunto subscribed our names this third day of May, A. D. 1897.

[SEAL.]

HENRY MILLER.
HENRY LUX.
THOMAS B. BISHOP.
J. LEROY NICKEL.
EDWARD T. ALLEN.
JESSE S. POTTER.
AZRO N. LEWIS.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this third day of May, A. D. 1897, before me, N. E. W. Smith, a Notary Public in and for the City and County of San Francisco, State of California, duly commissioned and sworn, personally appeared Henry Miller, Henry Lux, Thomas B.
271 Bishop, J. Leroy Nickel, Edward T. Allen, Jesse S. Potter, and Azro N. Lewis, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at the City and County of San Francisco, State of California, this third day of May, A. D. 1897.

[NOTARIAL SEAL.] N. E. W. SMITH,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed in the office of the County Clerk of the City and County of San Francisco, State of California, this 4th day of May, A. D. 1907.

C. F. A. CURRY,
County Clerk,
By WM. R. JOHNSON,
Deputy Clerk.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, C. F. Curry, County Clerk of the City and County of San Francisco, State of California, hereby certify the foregoing to be a full, true and correct copy of the Original Articles of Incorporation of Miller & Lux filed in my office on the 4th day of May, A. D. 1897.

Attest my hand and my official seal this 4th day of May, A. D. 1897.

[SEAL.] C. F. CURRY,
County Clerk,
By WM. R. A. JOHNSON,
Deputy County Clerk.

(Endorsed:) Filed in the office of the Secretary of State the 5 day of May, A. D. 1907. L. H. Brown, Secretary of State.

272 No. 1093.

STATE *of* CALIFORNIA, DEPARTMENT OF STATE.

I, L. H. Brown, Secretary of State *of State* of the State of California, do hereby certify that I have carefully compared the annexed copy of Articles of Incorporation of Miller & Lux with the certified copy of the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof.

Also, that this authentication is in due form and by the proper officer.

Witness my hand and the Great Seal of State, at office Sacramento, California, the 14th day of June A. D. 189–.

[SEAL.] L. H. BROWN,
Secretary of State,
By W. T. SESNON, *Deputy.*

(Endorsed:) Copy. Articles of Incorporation of Miller and Lux. Dated May 3d, A. D. 1897. Defendant's "Exhibit D."

273 PLAINTIFF'S "EXHIBIT NO. ONE." G. W. C.

In the Superior Court of the County of Merced, State of California.

J. J. STEVENSON, Plaintiff,
vs.
THE SAN JOAQUIN AND KINGS RIVER CANAL AND IRRIGATION COMPANY, Defendant.

Decision.

From the pleadings and evidence in the above entitled cause the Court finds the following to be the facts:

1. The plaintiff is now, and for more than ten years next before the commencement of this action has been, the owner and in the possession and entitled to the possession of all those certain lands situate, lying, and being in the County of Merced, State of California, described as follows, to-wit:

All those portions of Townships 6 South, Range 9 East, 7 South, Range 9 East, and 7 South, Range 10 East, Mount Diablo Meridian, which are comprised in Swamp and Overflowed Land Surveys of said Merced County Nos. 156, 158, 157, 112, 113, 160, 155, 115, 114, 126, 129, 128, 131, 127, 124, 133, 132, 130, 233, 234, 232, 189, 85, 67, and 236, containing in all 2407.27 acres.

2. The San Joaquin River is a natural stream of water with well defined bank and channel, through and over which channel of said river, throughout its entire course, water flows from the Sierra Nevada Mountains to the Bay of San Francisco, and said river in its meanderings passes through the Counties of Fresno, Madera, Merced,
274 and Stanislaus, in said state. The said Channel of said river forms the south and west boundaries of the lands of plaintiff above described, and said lands border upon said river and are riparian thereto.

3. The plaintiff is, by virtue of his ownership of said lands, a riparian proprietor on said river; but he is not the owner of all or any of the water flowing in said river, and is entitled to the use and enjoyment of only so much of said water as a riparian proprietor is entitled to use by virtue of such proprietorship.

4. Upon said above described land the plaintiff now pastures, and

for more than ten years last past has continuously pastured, numbers of horses, mules, and cattle, and the said horses, mules, and cattle have been accustomed to and did water thereat.

5. The said land above described is adapted to irrigation by water from said river; but said water has not been used by plaintiff for the irrigation of said land, except such irrigation as is naturally caused by percolation and overflow thereon of the waters of said river. As a result of such percolation and overflow, the plaintiff has raised large crops of grass and feed on said land for the said horses, mules and cattle pastured thereon.

6. The defendant is, and has been ever since the year 1871, a corporation duly organized, existing, and acting under and by virtue of the laws of the State of California.

7. The defendant was organized for the purpose, among others, of acquiring water rights and interests therein, of acquiring and holding land, of constructing and maintaining water ditches, canals, and other property, and of furnishing, supplying, and selling water to its stockholders and others for domestic, stock, agricultural, mechanical, manufacturing, and other purposes.

275 8. In the year 1871, the defendant erected a dam in said Fresno County, and in and across the channel of the said San Joaquin River, and maintained the same thereafter continuously up to the year 1898, in which year it erected another dam at substantially the same place at which said former dam was situated; and, for more than five years prior to the commencement of this action, it has, by means of said former dam and its said present dam, diverted and taken from the said San Joaquin River a portion of the waters thereof amounting, whenever there was sufficient water in said river for that purpose, to 760 cubic feet thereof per second.

9. The defendant is, and for more than five years prior to the commencement of this action has been, the owner and in the possession and entitled to the possession of those certain lands in the Counties of Fresno and Madera in said state, described in "Schedule A" of the answer, of which lands sixteen hundred (1600) acres border on and are riparian to the said San Joaquin River.

10. The water so diverted by defendant from said river has, during all of said period, been conducted by it, through canals and ditches constructed, owned, and operated by it, through the said Counties of Fresno and Merced and into the said County of Stanislaus; and has been supplied and sold by it to other persons to be used, and which has by them been used, for the irrigation of land, and for domestic and stock and other beneficial purposes.

11. The land which has been so irrigated by the persons to whom the defendant has so sold said water does not and never did border upon the said San Joaquin River, and is not and never was riparian thereto.

12. None of the said water so diverted by the defendant and used upon said non-riparian land has been wasted; but the same was consumed by said irrigation and other beneficial uses, and was
276 not returned to said river above the plaintiff's said lands.

13. By reason of the said diversion of said water by de-

fendant as aforesaid, the plaintiff has been deprived of the use of said water for plaintiff's said horses, mules, and cattle to drink, and for the irrigation of plaintiff's said lands; but plaintiff has not been damaged thereby in any sum of money.

14. From the year 1871, and down to the commencement of this action, the defendant has so maintained its dam and canals aforesaid, and diverted and used the water aforesaid, openly, continuously, uninterruptedly, peaceably, and adversely to the plaintiff and all the world, under a claim of right and claiming the right so to do; all of which was, during all of said time, well known to plaintiff and his grantors and predecessors in interest.

15. The defendant threatens and intends to continue to divert said water, and a still greater quantity of water, from said river, and the diversion by defendant of any greater quantity than said amount of 760 cubic feet per second would result in the impairment of the fertility and value of plaintiff's said land, to the great and irreparable damage and injury of plaintiff; and pecuniary compensation therefor would not afford adequate relief for such damage and injury.

16. Plaintiff's cause of action, so far as the same extends to said amount of 760 cubic feet of water per second, is barred by the provisions of Sections 318 and 319, and subdivision 2 of Section 338, of the Code of Civil Procedure; but his cause of action as to any of said water in excess of said amount of 760 cubic feet per second is not so barred.

17. The water diverted by the defendant into its canals can not conveniently be measured at its headgates; but the same can conveniently be measured, with substantial accuracy, at a point on its Main Canal, distant 6134 feet, measured along the Northerly
277 bank of said canal, from the upper face of the Headgate of said Main Canal; and the quantity of water carried by said canal at that point is substantially the quantity diverted by the defendant from said river.

And as conclusions of law from the foregoing facts the Court finds and decides:

(*a*)—That defendant is entitled to divert from said San Joaquin River, by means of its dam and canals aforesaid, or by such other means as will produce substantially the same results, 760 cubic feet of water per second, and to use the same for the purposes for which it has so used said water as aforesaid.

(*b*)—That the defendant is not entitled to divert from said San Joaquin River and carry or conduct on to any non-riparian land, any greater quantity of water than 760 cubic feet per second.

(*c*)—That the quantity of water which the defendant may lawfully divert from said river for use upon lands riparian to said river is not in issue in this action, and there is no evidence from which the same can be determined, and the same is not hereby determined.

(*d*)—Let judgment be entered enjoining and restraining the defendant, its counselors, attorneys, solicitors, and agents, and all others acting in aid or assistance of defendant, from diverting, above the said lands of plaintiff, more than 760 cubic feet of water per second

from the San Joaquin River, for use upon, and from carrying or conducting to, any lands not riparian to said river, and awarding to plaintiff the sum of one dollar ($1.) damages, but without costs.

(*e*)—Said judgment is to be without prejudice to the right of plaintiff hereafter to commence and maintain such action or actions as he may be advised to determine and limit the quantity of water which the defendant may divert from said river for use upon lands riparian to said river.

M. L. SHORT,
Judge Presiding.

278 (Endorsed:) No. 1767. Superior Court, County of Merced, State of California. J. J. Stevinson, Pl'ff, *vs.* The San Joaquin and Kings River Canal and Irrigation Co., Def't. Decision. Filed Apr. 2nd, 1906. W. B. Croop, Clerk.

279 PLAINTIFF'S "EXHIBIT NO. 2." G. W. C.

In the Superior Court of the County of Merced, State of California.

J. J. STEVINSON, Plaintiff,
vs.
THE SAN JOAQUIN AND KINGS RIVER CANAL AND IRRIGATION COMPANY, Defendant.

Decree.

This cause came on regularly for trial before the Court, sitting without a jury, on the 6th day of February, 1905, a jury trial having been waived. Messrs. James F. Peck, H. A. V. Torchiana, and Charles C. Boynton appeared for the plaintiff, and Messrs. R. E. Houghton, J. K. Law, and W. B. Treadwell appeared for the defendant. Thereupon witnesses were sworn and examined and documentary evidence introduced on behalf of the respective parties; and, after argument by counsel, the cause was submitted and by the Court taken under advisement.

And now, on this 2nd day of April, 1905, the Court being fully advised in the premises, files its findings of fact and conclusions of law, and orders judgment to be entered accordingly.

Wherefore, by reason of law, and the findings aforesaid, it is by the Court here ordered adjudged, and decreed:

1. That the defendant, The San Joaquin and Kings River
280 Canal and Irrigation Company, is entitled to divert from the San Joaquin River, by means of its dam and canals mentioned in the answer herein, or by such other means as will produce substantially the same results, seven hundred and sixty (760) cubic feet of water per second, and to use the same for the purposes of irrigation of land, and for domestic and stock and other beneficial purposes;

2. That said defendant is not entitled to divert from said river

and carry or conduct to or upon any land not riparian to said river, any greater quantity of water than seven hundred and sixty (760) cubic feet per second;

3. That the quantity of water which said defendant may lawfully divert from said river for use upon lands riparian to said river, is not hereby determined;

4. That the said defendant, its counselors, attorneys, solicitors, and agents, and all other persons acting in aid or assistance of said defendant, are, and each of them is, hereby forever enjoined and restrained from diverting from said San Joaquin River, at any point above the lands of the plaintiff, J. J. Stevinson, hereinafter described, any greater quantity than seven hundred and sixty (760) cubic feet of water per second, for use upon, and from carrying or conducting the same to, any lands not riparian to said river;

The said lands of the said plaintiff are described as follows:

All those portions of Townships 6 South, Range 9 East, 7 South, Range 9 East, and 7 South, Range 10 East, Mount Diablo Meridian, which are comprised in Swamp and Overflowed Land Surveys of said Merced County Nos. 156, 158, 157, 112, 113, 160, 155, 115, 114, 126, 128, 129, 131, 127, 124, 133, 132, 130, 233, 234, 232, 189, 85, 67, and 236, containing in all 2407.27 acres;

5. For the purpose of the better enforcement of this decree, the quantity of water diverted by said defendant from said river
281 for use upon non-riparian lands, is to be measured at that point in the Main Canal of said defendant distant six thousand one hundred and thirty-four (6134) feet, measured along the Northerly bank of said canal, from the upper face of the Headgate of said Main Canal; which said point of measurement has been agreed upon by the parties hereto;

The defendant shall, at all times, keep and maintain, at said place, a suitable foot-bridge across said canal, and all other necessary conditions to enable the water flowing in said canal at that place to be readily and conveniently measured by the parties hereto;

But, inasmuch as, by change of circumstances or otherwise, alterations in this decree with respect to said measurement may become necessary or proper, leave is hereby granted to either of the parties hereto, hereafter to apply to the Court, by supplemental pleading or in other suitable manner, for such alterations in or modifications of this decree as he or it may be advised to apply for, with respect to the place or manner of measurement of said water; and the Court hereby reserves the right at any time to alter or modify this decree, in those particulars, upon such application;

6. That the said plaintiff do have and recover of and from the said defendant the sum of one dollar ($1.00) damages, but without costs;

7. That this decree shall be and is without prejudice to the right of said plaintiff hereafter to commence and maintain such action or actions as he may be advised, to determine and limit the quantity of water which said defendant may divert from said river for use upon lands riparian to said river.

M. L. SHORT,
Judge Presiding.

282 (Endorsed:) No. 1767. Superior Court, County of Merced, State of California. J. J. Stevinson, Pl'ff, *vs.* The San Joaquin and Kings River Canal and Irrigation Co., Def't. Decree. Filed April 2nd, 1906. W. B. Croop, Clerk.

283 PLAINTIFF'S "EXHIBIT No. 3." G. W. C.

In the Superior Court of the County of Merced, State of California.

J. J. STEVINSON, Plaintiff,
vs.
THE SAN JOAQUIN AND KINGS RIVER CANAL AND IRRIGATION COMPANY, Defendant.

In this action Plaintiff as a riparian owner of lands bordering on the San Joaquin River seeks to enjoin Defendant from diverting any water from said river above the lands of plaintiff.

The motion of defendant to be allowed to file certain proposed amendments to its answer in the case, made at the conclusion of the argument and before the case had been finally submitted, is hereby denied and defendant is allowed its exception to the ruling of the Court.

At the trial it was admitted that plaintiff was a riparian owner of lands bordering on the said river, and as such was entitled to certain rights to the flow of the waters of said stream past his lands, subject to such rights as had been acquired by defendant.

1st. As a public use corporation, formed for the purpose of appropriating water for sale, rental or distribution,

2nd. By adverse user.

Both questions were elaborately and ably argued by the counsel for the respective parties.

After a careful and laborious examination of all the evidence given in the case, I am of the opinion that under the pleadings on which the case was tried that the rights of the parties should be determined under the second contention, adverse user, and will therefore consider only the latter subject in my determination of
284 the respective rights of the parties.

The evidence clearly shows beyond contradi-tion that the defendant was the owner of a large system of canals capable of carrying and distributing, and which did carry and distribute large quantities of water continuously during the irrigating season of each year, to a vast territory under the said system of canals, for much more than five years before the commencement of this action, which waters were diverted by means of a brush dam constructed across the said San Joaquin River, until about the year 1898, when a very substantial weir was constructed and took the place of said brush dam.

But counsel for plaintiff contend, that conceding the fact that defendant did divert the water from the river as above set forth, yet it could acquire no right to the said water so diverted unless it had

been applied to a beneficial use, and make the point that the evidence shows beyond contradi-tion that large quantities of the water diverted was used during a part of the season and some during the whole of year, for the flooding of wild grass lands, and that such use was not a beneficial use of said water.

This contention of plaintiff's counsel I think in view of testimony which was not seriously contradicted, that this class of irrigation caused large crops of nutritious grasses to grow on lands which were formerly practically worthless for a great portion of the year, must be held to not be well taken.

Still, counsel say, conceding it to be a beneficial use, the way in which it has shown to have been used in this case is an extravagant use of the water and should not be tolerated. That the law provides, that the water should not only be used for a beneficial purpose, but that it should be used in the most economical manner possible, and if economy was practiced in this class of irrigating that from
285 one-half to two-thirds of the water could be saved, but I am inclined to believe that this is not a matter for correction by the Court, and even were it so, that the evidence in this case would not justify this Court in declaring a forfeiture of any of the water, because used as the evidence shows it to have been used in this case.

It further appears from the evidence that the system of wild grass irrigation, wherever new territory is being brought under it is being done under more improved methods.

Plaintiff's counsel further contend that there is shown by the evidence to be a large quantity of water wasted that is not used for any purpose, but simply runs into the swamp and on back into the river.

I have very carefully read the evidence relating to this point and after due consideration thereof I am of the opinion that the most of this so called surplus water or waste, is taken up and spread over the wild grass lands, and while toward the latter part of the season much of it flows on to the river, that the testimony of the manner of raising grasses and the character of the land, make it necessary for the water to keep moving and that there should be a drainage to keep the water pure and the grass growing.

Having therefore arrived at the conclusion that a large quantity of water has been diverted for more than five years before the commencement of this action, and that it has been applied to a beneficial use, and from a reading of the evidence being convinced that it has been taken adversely to the plaintiff, the next question to be determined is the quantity of water to which the defendant has become entitled. This the most difficult of all the points in the case, because of the great variance in the testimony of the engineers, has been arrived at by me from a careful consideration of all the
286 evidence given in the case, and a comparison of the large territory over which the system of canals extends, with the testimony of said engineers, and while the conclusion that I have made may not meet with the approval of either party to the action, yet it is my best judgment: that the defendant has acquired by adverse user the right to divert from said river sufficient water to have flow-

ing in its canal at the point of measurement, seven hundred and fifty feet of water per second, at all times when there is sufficient water in the river.

On the question that there should be allowed to flow at all times a certain number of feet which was shown to be leaking through the brush dam, I have been unable to find any evidence to show that it ever reached the lands of plaintiff, to amount to anything, even in the irrigating season. See testimony of Plaintiff, pages 1140-1141, Vol. 2.

And the contention of counsel, that if the Court found the wild grass irrigation to be beneficial, then its decree should also provide that the water should also continue to flow into the river at the mouth of Salt Slough, in quantities as shown by the evidence.

I think is not well taken, because not within the issues in this case; that is a matter to be determined in the future should the water cease to so flow.

Nor do I think that the judgment in this case should determine anything in regard to the riparian lands of the defendant, for the evidence in this case is not sufficient to enable the Court to determine the respective rights of the parties in regard to the riparian lands; that also is a matter for future adjudication.

The above are my conclusions in the matter and let findings and judgment be prepared in accordance therewith.

287 STATE OF CALIFORNIA, *County of Merced*, ss:

COUNTY CLERK'S OFFICE.

I, P. J. Thornton, County Clerk of the said County of Merced, State of California, and *ex-officio* Clerk of the Superior Court thereof, do hereby certify that I have compared the foregoing copy of Decision of Court case No. 1767 and of the endorsements thereupon, with the original records of the same remaining in this office, and that the same are correct transcripts therefrom and of the whole of said original records.

Witness my hand and the seal of said Court this 25 day of April A. D., 1907.

[SEAL.] P. J. THORNTON, *Clerk*.

(Endorsed:) No. 1767. In the Superior Court of Merced County, State of California. J. J. Stevinson, Plaintiff, *vs.* The San Joaquin and Kings River Canal and Irrigation Co., Defendant. Decision of Court. Filed October 29th, 1905. W. B. Croop, Clerk.

288 PLAINTIFF'S "EXHIBIT No. 4." G. W. C.

In the Superior Court County of Merced, State of California.

MILLER & LUX (a Corporation), Plaintiff,
vs.
EAST SIDE CANAL AND IRRIGATION COMPANY (a Corporation), Defendant.

The Plaintiff above named complains of the defendant herein, an for cause of action alleges:

I.

That the plaintiff herein, Miller & Lux, is and ever since th fifth day of May, 1897, has been a corporation duly organized an existing under the laws of the State of California.

II.

That the defendant herein, the East Side Canal and Irrigatio Company, is and for more than thirteen years last past has been corporation duly organized and existing under the laws of the Sta of California.

III.

The plaintiff herein, Miller & Lux, is, and its grantors for mo than twenty-five years last past, have been the owners in fee an seized and possessed of all those certain tracts and parcels of lan situate in the counties of Merced and Stanislaus, State of Californi
289 which are particularly described in a certain Schedule, whic is hereto annexed marked "Schedule A," and made a pa of this complaint, and it and its grantors have been durin all of such time in the actual, continuous and exclusive possessio thereof, holding the same under claim of title exclusive of othe rights, founding such claim upon written instruments as being co veyances of the said lands, and holding said lands adversely to a the world, and all of said lands described in paragraphs 1 and of said Schedule "A" are a part of two Mexican Grants, known Rancho Sanjon de Santa Rita and Orestimba Rancho, and the tit was derived from the Mexican Government.

That said lands so owned and possessed as aforesaid, by said plai tiff, are situated along and bordering on a natural water course know as the San Joaquin River, and on a natural water course known Salt Slough, which is a branch of said San Joaquin River, and alon and bordering on other numerous channels or water courses, whic are branches of and connected with said River, and into and throug which the waters of said River naturally flow.

IV.

That the said San Joaquin River is a natural stream or wat course rising in the Sierra Nevada, and debouching from the mou

tains into the plains of the San Joaquin Valley, whence it flows naturally to and through its main channel, and through said Salt Slough, and numerous other sloughs and natural water courses, through the lands of the plaintiff described in said Schedule "A."

V.

That plaintiff is informed and believes that the waters of said San Joaquin River naturally flow, and from time immemorial have flowed, and do naturally flow along, by through, over and
290 upon a greater portion of plaintiff's lands, thereby irrigating them and making them fit for cultivation and pasture, besides supplying water thereon for stock and for agricultural purposes, and for all other purposes for which an owner of land bordering on a running stream has the right to use the water thereof, and from time immemorial the said waters have done so and would do so now were it not for the diversion, appropriation and consumption of them by the defendant, as hereinafter set forth.

VI.

The plaintiff avers that by the natural flow of the waters of the San Joaquin River, as aforesaid, a great part of plaintiff's said lands have always been wet and naturally irrigated during the winter and spring, so that it has always been possible, without artificial irrigation, to cultivate such portion of said lands, and raise crops and pasture on them, which facts constituted the principal inducement to plaintiff, and its grantors, to purchase the same; and on the faith that the same would have the benefit of the natural irrigation and overflow, as well as water for other uses, as aforesaid, to which a riparian proprietor is entitled, plaintiff, and its grantors, paid large *large* sums of *sums of* money for the same, and have, since the same were so purchased, expended large sums of money in improving the same, and in constructing canals and lateral canals and other works for controlling, regulating and utilizing the water so naturally supplied to said lands.

That said plaintiff herein and its grantors have under their claim and right as riparian proprietor of lands bordering on said San Joaquin River and said Salt Slough and other channels and branches thereof, for upwards of twenty years last past constructed
291 and used numerous canals and ditches to take water from said river, channels and branches, to irrigate the land of said plaintiff bordering on said river, channels and branches, and to supply water for stock, domestic and other purposes in connection with said lands and the occupants thereof, and have, during such period of time, diverted appropriated and used through said canals so constructed as aforesaid, a large volume of water from said San Joaquin River and from said Salt Slough, and from other channels and branches, to irrigate a large acreage of the land described in Schedule "A," and have used said waters to supply water for stock, domestic and other purposes in connection with said land and the occupants thereof.

VII.

That owing to the nature of the climate and the country, and the slight rainfall where plaintiff's said lands are situated, the said lands, unless irrigated by water flowing from a distance, are unfit for cultivation and pasture, and that there is no natural irrigation of a greater part of said lands except by the waters flowing down from the Sierra Nevada through the San Joaquin River, as aforesaid, and no means of irrigating a greater portion of said lands at all, save by the water of the San Joaquin River.

VIII.

That during the spring and summer months of every year, there is a large increase in the volume of water flowing down said San Joaquin River, caused by the melting of the snow in the Sierra Nevada. That the increased flow or flood water coming down said river at such times has, as plaintiff is informed and believes, from
292 time immemorial, caused a large portion of the land owned by plaintiffs, and bordering on said San Joaquin River, Salt Slough and its other branches and channels, and described in Schedule "A," to annually become and be overflowed for a limited period of time, that the water causing and constituting such overflow, has, each year brought down from the mountains and valleys, through which said river flows in its course to said lands, material which has annually fertilized and enriched the land that has by such waters been flooded and overflowed as aforesaid, and that such fertilizing and enriching of said lands has caused the said lands to annually yield increased crops of grasses and feed, and increased crops of cereals and other crops to which the same have, when cultivated, been planted, and has also largely increased the value of said lands. That such annual flooding and overflowing of such lands, has also so wet and irrigated the land so flooded and overflowed that it would and has annually grown increased, large, and valuable crops of grasses and feed for stock without further irrigation, when it would have grown little or no feed or crops had it not been so flooded and overflowed, unless it were otherwise irrigated. That such annual flooding and overflowing of such land has also so wet and irrigated the land so flooded and overflowed, that a portion thereof, after the flood water had receded, could be, and has been for many years last past, cultivated, and crops raised thereon without further irrigation, and which but for such flooding and overflowing, could not have been cultivated and crops raised thereon, unless such land were otherwise irrigated.

That if such increased volume of water, coming down said San Joaquin River at such season of the melting of the snow
293 in the Sierra Nevada, as aforesaid, be diverted from said river by defendants herein, and such water be not permitted to flow down to and annually overflow, wet, and irrigate the portion of lands described in Schedule "A," which it has heretofore so annually been accustomed to overflow, wet, and irrigate, as alleged herein, plaintiff will be deprived of and lose the valuable and in-

creased pasture, and feed, and crops, which they have annually, and for many years last past, received from said lands, and had the benefit of, and resulting from such annual flooding, overflowing, wetting, and irrigating of said lands.

That it will also be deprived of and lose the valuable and increased pasture and feed and crops, which they have annually, and for many years last past, received from said lands, and had the benefit of, and resulting from the fertilizing and enriching of said lands by the material brought to and deposited upon said lands by the waters of the San Joaquin River, at the time of such flooding and overflowing thereof, as hereinbefore alleged.

And plaintiff further avers that said lands will deteriorate in quality and become of less value, and instead of possessing or being of the value that said lands now are, by reason of being capable of producing, annually, large and valuable crops, will depreciate in value.

IX.

That the taking of water from the said San Joaquin River at or during such period of flood will produce great and irreparable injury to the plaintiff. That it will be impossible to estimate the loss and injury to plaintiff which will result from the reduction
294 and loss of pasture, feed, and crops, and the loss and injury to plaintiff by reason of said lands failing to be annually enriched and fertilized by such flooding, and by reason of said land not being annually irrigated and wet by such flooding and overflowing as hereinbefore alleged.

X.

That heretofore, as plaintiff is informed and believes, sometime during the year 1887, the Defendant East Side Canal and Irrigation Company, well knowing the premises, and intending to injure the plaintiff and its said lands, wrongfully dug away and removed a part of the bank of said San Joaquin River at a point in or near Section Seventeen (17), in Township (9), South of Range Twelve (12) East, Mount Diablo Base and Meridian, above the said lands of plaintiff, and constructed a canal or ditch running away from said river, at that point, and known as the East Side Canal.

And that at or about the time last mentioned, as plaintiff is informed and believes, said defendant wrongfully and without right, by means of dams, levees, sticks, earth, and other obstructions, by them wrongfully placed in the bed and channel of said San Joaquin River, obstructed the flow of said river, and of the water which the plaintiff was and is entitled to, as aforesaid, to have flow down, to through and by the plaintiff's lands as the same has been and was of right accustomed to flow, and diverted a portion of the water of said San Joaquin River into, and caused the same to run down the aforesaid canal so constructed by the defendant, and consumed the same, and prevented such water from flowing to, along, by, through,
295 over and upon plaintiff's said lands, as it naturally would have done had it not been so diverted, and that defendant has

ever since claimed the right so to divert and appropriate and consume such water and has ever since continued to do so, and is doing so still.

XI.

That as plaintiff is informed and believes, the said defendant the East Side Canal and Irrigation Company, has from time to time since the year 1887 enlarged said canal and has increased the size of the dam placed by said defendant in the San Joaquin River, and has diverted from said river an increased amount of water, and that said defendant has within the past five years more than doubled the capacity of said canal, and has diverted by means of a dam placed in the San Joaquin River, as hereinbefore set forth, and appropriated more than double the amount of water which had been before such time diverted from said river and into said canal.

XII.

That as plaintiff is informed and believes, all of the waters so diverted and taken from said river by defendant the East Side Canal and Irrigation Company, is water which the plaintiff has a right to have flow in said River, and in said Salt Slough, and in the other branches and channels of said River, and to, through, along, by and over said plaintiff's lands which are described in Schedule "A" hereto annexed, and which they have the right to use as riparian owners of lands bordering on the San Joaquin River and said Salt Slough and on the other branches and channels of said San Joaquin River.

296 XIII.

That as plaintiff is informed and believes, and therefore avers, the lands, to irrigate which the defendant has diverted and is diverting the water as aforesaid, are not, and never have been, within the memory of man, naturally irrigated at all by any of the waters of said San Joaquin River, nor is any of said land riparian to said river.

XIV.

That the diversion of said waters by said defendant, as hereinbefore set forth, will cause great and irreparable damage to plaintiff, in that the lands described in Schedule "A" annexed to this complaint, will not be supplied with water sufficient for their successful cultivation, and the said crops heretofore sowed and planted upon said lands, as hereinbefore set forth, will dry up and be destroyed, and be rendered valueless, and the cattle pastured on said lands will be deprived of water sufficient for their needs, and large numbers of them will die and be destroyed, and said pastures will be greatly damaged, and the value of said land will be greatly depreciated, and the said plaintiff will not receive the amount of water which it is entitled to receive as riparian proprietor owning lands on and along said San Joaquin River and Salt Slough and its other branches and channels to irrigate said lands, and for such other purposes as a ri-

parian proprietor is entitled to have and receive water from a water course running through such riparian lands.

That it will — impossible to estimate the exact value of said crops and pasturage, which, but for such proposed unlawful taking of the waters by defendant as aforesaid, would be sown, raised and
297 used, and that a large proportion of the crops and pasturage of the said irrigated lands would be dried up, killed and destroyed, and the actual damage therefrom is not susceptible of accurate measurement, and it would be impossible to estimate the amount or extent of the depreciation of the value of such lands, and plaintiff cannot obtain adequate relief in an action at law.

XV.

That said defendant continues, and threatens to continue the maintenance of said dam and other constructions in said River as aforesaid, and the wrongful diversion of said water as aforesaid, to the further, great, inestimable and irreparable damage of plaintiff.

Wherefore plaintiffs pray that the defendants may answer the premises; and that the Court will adjudge and declare that as against plaintiffs, the defendants have no right to obstruct the waters of the said San Joaquin River, or any portion thereof by dams, levees, sticks, earth, or otherwise; or divert them in any manner, or at any point so as to effect their natural flow down to, through and over the lands of plaintiff in this Complaint described to the prejudice of the riparian rights of plaintiff as owner of the land aforesaid.

And that this Honorable Court will by its decree herein stay perpetually and enjoin the defendant, and all its agents, servants and attorneys, from diverting or obstructing the waters of the said San Joaquin River, by dams, levees, sticks, or earth placed in the bed or channel of said River, or otherwise; and from maintaining, strengthening, or completing, any dams or levees, which have already been begun or erected for the purpose of diverting or
298 obstructing the water as aforesaid; and from interfering in any way with the said water above plaintiff's said land to the injury thereof.

And that until the final hearing and determination of this cause; and while the same is pending, the defendant may be restrained and enjoined from the commission of any of the acts herein sought to be perpetually enjoined.

And that plaintiff may have such other and further relief in the premises as the nature of the circumstances of this case may require and to this Honorable Court may seem meet, and its costs of suit.

HOUGHTON & HOUGHTON,
Plaintiff's Attorneys.

STATE OF CALIFORNIA, *City and County of San Francisco*, ss:

David Brown being duly sworn says: that he is the Secretary of the Corporation Miller & Lux, Plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as

to the matters therein stated on his information or belief, and as to those matters, he believes it to be true.

That he verifies this Complaint for and on behalf of said Corporation.

DAVID BROWN.

Subscribed and sworn to before me this 15th day of December, 1900.

JAMES L. KING,
Notary Public in and for the City and
[SEAL.] *County of San Francisco, State of California.*

299 SCHEDULE "A."

1st. That portion of the Mexican Grant known as the Rancho Sanjon de Santa Rita which is described as follows: Commencing at a point on the San Joaquin River in Township 8 South Range 11 East, Mount Diablo Base and Meridian, and near Dickenson's Ferry, where the North line of said Rancho connects with said River; thence West along the North line of said Rancho to the Southwest corner of Section Twenty-four (24) in Township 8 South, Range 10 East, Mount Diablo Base and Meridian; thence South along the East line of Sections 26 & 35 in said Township, and the East line of Sections 2 and 11 in Township 9 South of Range 10 East, Mount Diablo Base and Meridian to the Southeast corner of said Section 11; thence in a Southeasterly direction five miles more or less, to the Northeast corner of Section 4 in Township 10 South Range 11 East Mount Diablo Base and Meridian; thence Northeasterly 6 miles more or less to a point on the San Joaquin River South of and opposite the head of the canal of the East Side Canal and Irrigation Company; thence in a Northwesterly course following the meanderings of said San Joaquin River which forms the eastern boundary of said Rancho, to the place of beginning, said tract of land containing 20,000 acres of land more or less, and being a portion of said Rancho Sanjon de Santa Rita.

2nd. That portion of the Mexican Grant known as the Orestimba Rancho which is described as follows:

Beginning on the East line of Section 19 in T. 7 S. R. 9 E., M. D. M., at a point 9.75 chains North from quarter Section corner common to Sections 19 & 20, thence N. 39° 30' E. 256 chains more or less to the San Joaquin River; thence up said River fol-
300 lowing its meanderings to the point where said river intersects the East boundary line of said Rancho; thence south along the east boundary line of said rancho to the Southeast corner thereof; thence West 3¼ miles more or less along the South boundary line of said rancho to the Southwest corner of the Southeast quarter of the Northeast quarter of Section 4, T. 8, S. R. 9 E. thence North 80 chains; thence West 20 chains; North 80 chains; West 40 chains; North 40 chains; West 60 chains; North 40 chains; West 20 chains; and North 9.75 chains to the place of beginning; except-

ing 17.21 acres in Section 9 conveyed to Isaac Friedlander by a certain deed dated March 2d, 1876, and 1.15 acres in Section 9 conveyed to John M. McPike by a certain deed dated March 2d, 1876; the tract hereby intended to be described being the same tracts of land conveyed to Henry Miller and Charles Lux by John M. McPike by deed dated October 22d, 1868, recorded in Merced County on November 2d, 1868; by John M. McPike by deed dated September 26th, 1871, recorded in Merced County on October 26th, 1871; by Isaac Friedlander by deed dated July 23d, 1873, recorded in Merced County on January 16th, 1874, and in Stanislaus County on January 20th, 1874; by Isaac Lankershim by deed dated April 3d, 1874, recorded in Merced County on May 20th, 1874, and in Stanislaus County on May 22d, 1874; and by George Linn, by deed dated November 11th, 1873, recorded in Merced County on November 12th, 1873, and being a portion of said Rancho Orestimba, containing 8000 acres more or less.

3rd. All of the land in Township 7 South Range 10 East M. D. M. lying South and West of the San Joaquin River.

4th. All of the following described land in Township
301 8 South Range 9 East, M. D. M.

The South half of Section 1.

The South half of Section 2.

All of Sections 11, 12, 13 and 14.

5th. All of the following described land in Township 8 South Range 10 East, M. D. M.

All of the land in said Township lying South and West of the San Joaquin River, except Sections 25 and 36.

Of Section 12, all of the land included in Swamp and Overflowed Land Surveys Nos. 223, 243, & 286.

Of Section 13, all of the land included in Swamp and Overflowed Land Survey No. 222.

6th. All of the following described land in Township 8 South Range 11 East M. D. M.

Of Section 7, the West half of the southwest quarter.

Of Section 18 the north half of the southwest quarter and the Northwest quarter.

Of Section 19 the Northeast quarter of the Northeast quarter.

Of Section 20 Lot 7 and the Southwest quarter of the Northeast quarter.

Also all of Sections 18, 19, & 20 lying south and west of the San Joaquin River.

Of Section 28 the N. E. ¼ of the N. W. ¼, N. ½ of N. E. ¼ and S. E. ¼ of the N. E. ¼.

Swamp and Overflowed Land Survey No. 195, and Swamp and Overflowed Land Survey No. 194, excepting five acres beginning at the Southeast corner of the Northeast ¼ of the S. E. ¼ of
302 Section 28, thence W. 10 chains, thence N. 45° E. 14.14 chains, thence S. 10 chains to the place of beginning.

Of Section 33 all of the land included in Swamp and Overflowed Land Survey No. 205.

7th. In Township nine South, Range 11 east, M. D. M., the following described land:

Of Sections 3 & 4 all of the land included in Swamp and Overflowed Land Survey 325.

Of Section 10 all of the land included in Swamp and Overflowed Land Survey No. 327.

8th. In Township 9 South, Range 10 East, M. D. M. the following described land:

All of Sections 2, 3, 4, 10, 11, 14, 15, 22, 23, 24, 25, 26 & 36, except the southeast quarter of Section 26.

9th. In Township 9, South, Range 11 East, M. D. M. the following described land:

Commencing at the southwest corner of said Township, thence east 3 miles more or less to the Northeast corner of Section 4, in Township 10, South, Range 11 East, M. D. M. thence Northeasterly 4 miles more or less to the Northeast corner of Section 24, in Township 9 South, Range 10 East, M. D. M. thence South 3 miles more or less to the place of beginning.

303 STATE OF CALIFORNIA,
County of Merced, ss:

COUNTY CLERK'S OFFICE.

I, P. J. Thornton, County Clerk of the said County of Merced, State of California, and *ex-officio* Clerk of the Superior Court thereof, do hereby certify that I have compared the foregoing copy of Complaint in case No. 1835 and of the endorsements thereupon, with the original records of the same remaining in this office, and that the same are correct transcripts therefrom and of the whole of said original records.

Witness my hand and the seal of said Court, this 22d day of April A. D., 1907.

[SEAL.] P. J. THORNTON, *Clerk.*

(Endorsed:) No. 1835. In the Superior Court, County of Merced, State of California. Miller & Lux (a corporation), Plaintiff, *vs.* East Side Canal and Irrigation Company, Defendant. Complaint. Filed December 17th, 1900. W. B. Croop, Clerk. Houghton & Houghton, Attorneys for Plaintiff.

304 PLAINTIFF'S "EXHIBIT No. 5." G. W. C.

In the Superior Court of the County of Merced, State of California.

MILLER & LUX, a Corporation, Plaintiff,
vs.
EAST SIDE CANAL AND IRRIGATION CO., Defendant.

Now comes the plaintiff herein, Miller & Lux, a corporation, and dismisses the above entitled action and requests the Clerk of this

Court to make the proper entry in the Register of actions dismissing said action.

Dated June 15th, 1905.

HOUGHTON & HOUGHTON,
Attorneys for Plaintiff.

305 STATE OF CALIFORNIA,
County of Merced, ss:

COUNTY CLERK'S OFFICE.

I, P. J. Thornton, County Clerk of the said County of Merced, State of California, and *ex-officio* Clerk of the Superior Court thereof, do hereby certify that I have compared the foregoing copy of Dismissal of action in case No. 1835 and of the endorsements thereupon, with the original records of the same remaining in this office, and that the same are correct transcripts therefrom and of the whole of said original records.

Witness my hand and the seal of said Court, this 23 day of April A. D., 1907.

[SEAL.] P. J. THORNTON, *Clerk.*

No. 1835. In the Superior Court, County of Merced, State of California. Miller & Lux, a corporation, Plaintiff, *vs.* East Side Canal and Irrigation Co., Defendant. Dismissal of Action. Filed June 17th, 1905. W. B. Croop, Clerk. Houghton & Houghton, Attorneys for ——.

306 PLAINTIFF'S "EXHIBIT No. 6." G. W. C.

MILLER & LUX, a Corporation, Plaintiff,
against,
EAST SIDE CANAL AND IRRIGATION COMPANY, a Corporation, Defendant.

The request of Houghton & Houghton attorneys for Plaintiff for the dismissal of the above entitled action the same is hereby dismissed this 17th day of June 1905.

W. B. CROOP, *Clerk.*

STATE OF CALIFORNIA,
County of Merced, ss:

COUNTY CLERK'S OFFICE.

I, P. J. Thornton, County Clerk of the said County of Merced, State of California, and *ex-officio* Clerk of the Superior Court thereof do hereby certify that I have compared the foregoing copy of Dismissal of Action No. 1835 and of the endorsements thereon with the original records of the same remaining in this office, and that same are correct transcripts therefrom and of the whole of said original records.

Witness my hand and the seal of said Court this 23 day of April A. D. 1907.

[SEAL.] P. J. THORNTON, *Clerk.*

307 (Endorsed:) No. 92. In the Circuit Court of the United States, Southern District of California, Northern Division. Miller & Lux, incorporated, Complainant, *vs.* East Side Canal & Irrigation Co., a corporation, Defendant. Deposition of J. Leroy Nickel. Filed May 6, 1907. Wm. M. Van Dyke, Clerk. Examiner's fees: 78 folio notes transcribed at 20 cents folio, $15.60. Geo. W. Cherry, Examiner.

308 In the Circuit Court of the United States for the Southern District of California, Northern Division.

No. 92.

MILLER & LUX, INCORPORATED, Complainant,
vs.
EAST SIDE CANAL AND IRRIGATION CO., Defendant.

In this cause, I hereby certify that the order and decree of dismissal herein made is based solely on the ground that the only ground of jurisdiction in this Court alleged in the record is that the controversy involved is one between citizens of different states, but that it appears to the satisfaction of the Court that the complainant has been improperly made a party for the purpose of creating a case cognizable under the Act of Congress in that behalf, and that said suit does not really and substantially involve a dispute or controversy between citizens of different states or otherwise properly within the jurisdiction of this Court; and that, treating the answer as raising this question of jurisdiction, the suit is dismissed only for the reasons above stated.

This certificate is made conformably to Act of Congress of March 3, 1891, chapter 517, and the opinion filed herein is made a part of the record, and will be certified and sent up as a part of the proceedings, together with this certificate.

This 4th day of May 1908.

OLIN WELLBORN,
District Judge, Holding the Circuit Court of the United States for the Southern District of California, Northern Division.

309 (Endorsed:) 92. U. S. Circuit Court, Southern District of California, Northern Division. Miller & Lux, Incorporated, Complainant, *vs.* East Side Canal & Irrigation Co., Defendant. Court's Certificate as to Question of Jurisdiction. Filed May 4, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

310 In the Circuit Court of the United States in and for the Southern District of California, Northern Division, Ninth Circuit.

No. 92.

MILLER & LUX, INCORPORATED, Complainant,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY, Defendant.

To the Clerk of the above entitled court, and to the defendant and Mr. James F. Peck, its solicitor:

You will please take notice that the Plaintiff in the above entitled suit hereby substitutes Mr. Edward F. Treadwell as its solicitor therein, in the place and stead of Messrs. R. E. Houghton and E. T. Houghton.

Dated 18th May 1908.

MILLER & LUX, INCORPORATED,
By J. LEROY NICKEL, *Vice-President.*
[SEAL.] By DAVID BROWN, *Secretary.*

We hereby consent to the foregoing substitution.

R. E. HOUGHTON.
E. T. HOUGHTON.

I hereby accept the foregoing substitution.

EDWARD F. TREADWELL.

(Endorsed:) No. 92. In the Circuit Court of the United States in and for the Southern District of California, Northern Division, Ninth Circuit. Miller & Lux Incorporated, Complainant, *vs.* East Side Canal & Irrigation Company, Defendant. Substi-tion of Solicitor Subject to all objections hereto, because of the dismissal of this action, I Receive a copy of the within this 18th day of May, 1908. James F. Peck, Attorney for defendant. Filed May 21, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Edward F. Treadwell, Attorney-at-law, 1314 Merchants Exchange Building, San Francisco, California.

311 In the Circuit Court of the United States in and for the Southern District of California, Northern Division, Ninth Circuit.

No. 92.

MILLER & LUX, INCORPORATED, Complainant,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY, Defendant.

Petition for Appeal.

To the Honorable, the Circuit Court of the United States, in and for the Southern District of California, Northern Division:

Your Petitioner, Miller & Lux Incorporated (a Corporation) respectfully represents that there is manifest error committed to the injury of Petitioner by the final decree pronounced in this case, in and by which said final decree pronounced in this case, in and by which said final decree this Court refused jurisdiction for the cause set forth in your Petitioner's Bill of Complaint, on the ground that said Court had no jurisdiction of the same, and on said ground entered a final decree dismissing said suit for want of jurisdiction.

Wherefore your Petitioner, Miller & Lux Incorporated (a Corporation), considering itself aggrieved prays an order granting an appeal from said final decree denying the jurisdiction, as aforesaid, to the Supreme Court of the United States, as authorized by Section 5 of the Act of Congress of the United States, approved March 3, 1891, and prays this Honorable Court that said appeal be allowed solely upon said question of jurisdiction, and that a transcript of
312 so much of the record, proceedings and papers upon which said decree was made as may be necessary to present said question of jurisdiction on appeal, duly authenticated, may be sent to the Supreme Court of the United States.

Your Petitioner herewith files and offers its bond in the penal sum of Five Hundred (500) Dollars, and ask- that the same be approved and that the appeal be allowed.

EDWARD F. TREADWELL,
Solicitor for Complainant.

(Endorsed:) No. 92. In the Circuit Court in and for the Southern District of California, Northern Division, Ninth Circuit. Miller & Lux, Incorporated, Complainant, *vs.* East Side Canal & Irrigation Company, Defendant. Petition for Appeal. Filed May 23, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Edward F. Treadwell, Attorney-at-law, 1314 Merchants Exchange Building, San Francisco, California.

313 In the Circuit Court of the United States in and for the Southern District of California, Northern Division, Ninth Circuit.

No. 92.

MILLER & LUX, INCORPORATED, Complainant,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY, Defendant.

Assignment of Errors.

Now comes the Complainant and Appellant, Miller & Lux Incorporated, and says that in the record and proceedings in the above entitled matter there is manifest errors in this, to-wit:

I.

The Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division, erred in holding and deciding that the said Court had no jurisdiction to try and determine said suit and in rendering its decree dismissing the Bill therein on that ground.

II.

Said Court erred in deciding that the said Complainant had been improperly made a party for the purpose of creating a case cognizable under the Act of Congress in that behalf, and in holding and deciding that said suit does not really and substantially involve a dispute or controversy between citizens of different states;

Wherefore the said Miller & Lux Incorporated (a Cor-
314 poration) prays that said Decree and Order of said Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division, appealed from herein be reversed.

EDWARD F. TREADWELL,
Solicitor for Complainant and Appellant.

(Endorsed:) No. 92. In the Circuit Court in and for the Southern District of California, Northern Division, Ninth Circuit. Miller & Lux, Incorporated, Complainant, *vs.* East Side Canal & Irrigation Company, Defendant. Assignment of Errors. Filed May 23, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Edward F. Treadwell, attorney-at-law, 1314 Merchants Exchange Building, San Francisco, California.

315 In the Circuit Court of the United States in and for the Southern District of California, Northern Division, Ninth Circuit.

No. 92.

MILLER & LUX, INCORPORATED, Complainant,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY, Defendants.

Know all men by these presents, that we, Miller & Lux Incorporated, a Corporation organized and existing under the laws of the State of Nevada, Complainant and Appellant in the above entitled suit, and A. J. Etter and E. F. Ogle, are held and firmly bound unto the East Side Canal & Irrigation Company (a Corporation), the above named Defendant, in the sum of Five Hundred (500) Dollars, to be paid to it for the payment of which well and truly to be made we bind ourselves, and each of us, and our and each of our heirs, executors and assigns, jointly and severally firmly by these presents.

Sealed with our hands and dated this 18th day of May, 1908.

Whereas the above named Complainant has prayed for an appeal to the Supreme Court of the United States to reverse the Order and Judgment of the United States Circuit Court, in and for the Southern District of California, Northern Division, made and entered in the above entitled suit on the 4th day of May, 1908.

Now, therefore, the condition of this obligation is such
316 that if the above named complainant shall prosecute said appeal to effect and answer all damages and costs; if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

MILLER & LUX, INCORPORATED
(A CORPORATION),
[SEAL.] By J. LEROY NICKEL, *Vice-President.*
By DAVID BROWN, *Secretary.*
A. J. ETTER.
E. E. OGLE.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this Eighteenth day of May in the year One Thousand Nine Hundred and Eight, before me, James Mason, a Notary Public in and for the said City and County, residing therein, duly commissioned and sworn, personally appeared J. Leroy Nickel and David Brown known to me to be the Vice-President and Secretary respectively of Miller & Lux Incorporated the Corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the Corporation therein named, and they acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year in this Certificate first above written.

[SEAL.] JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

317 The foregoing Bond is hereby approved this 23 day of May, 1908.

OLIN WELLBORN,
District Judge, Holding the Circuit Court of the United States, Southern District, Northern Division.

In the Circuit Court of the United States in and for the Southern District of California, Northern Division, Ninth Circuit.

No. 92.

MILLER & LUX, INCORPORATED, Complainant,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY, Defendants.

UNITED STATES OF AMERICA,
State of California, County of Madera, ss:

A. J. Etter and E. F. Ogle, being first duly sworn, each for himself, deposes and says: That he is a resident and householder within said District, and worth the specified sum in this bond, over and above all his just debts and liabilities, exclusive of property exempt from execution.

A. J. ETTER.
E. F. OGLE.

Subscribed and sworn to before me this 20th day of May, 1908.

[SEAL.] E. M. McCARDLE,
Notary Public in and for Madera County, State of California.

318 (Endorsed:) No. 92. In the Circuit Court in and for the Southern District of California, Northern Division, Ninth Circuit. Miller & Lux Incorporated, Complainant, *vs.* East Side Canal & Irrigation Company, Defendant. *Bond on Appeal.* Filed May 23, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Edward F. Treadwell, Attorney-at-law, 1314 Merchants Exchange Building, San Francisco, California.

319 In the Circuit Court of the United States in and for the Southern District of California, Northern Division.

No. 92.

MILLER & LUX, INCORPORATED, Complainant,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY, Defendant.

Order Allowing Appeal.

The Complainant's Bill having been dismissed by the Decree of this Court on the sole ground that the Court had no jurisdiction in the action, and the Complainant having prayed an appeal to the Supreme Court of the United States on said question of jurisdiction, it is now ordered that the appeal be allowed on that question only;

And it is further ordered that so much of the record, proceedings and papers on which said order and decree was made as are necessary to present said question of jurisdiction and no more be included in the record on appeal.

And it appearing to the Court that all of the papers, records and files in the above entitled action are necessary to present said question of jurisdiction, it is ordered that all thereof be included in said record on appeal.

Done at Chambers.

Dated May 23rd, 1908.

OLIN WELLBORN,
District Judge, Holding the Circuit Court of the United States, Southern District of California, Northern Division.

320 (Endorsed:) In the Circuit Court in and for the Southern District of California, Northern Division, Ninth Circuit. Miller & Lux Incorporated, Complainant, *vs.* East Side Canal & Irrigation Company, Defendant. *Order Allowing Appeal.* Filed May 23, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Edward F. Treadwell, attorney-at-law, 1314 Merchants Exchange Building, San Francisco, California.

321 In the Circuit Court of the United States of the Ninth Judicial Circuit in and for the Southern District of California, Northern Division.

No. 92.

MILLER & LUX, INCORPORATED, Complainant,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY, Defendant.

Order Modifying Order Respecting Record on Appeal.

An order having heretofore, on the 23rd day of May, 1908, been made, allowing an appeal in the above entitled cause to the Supreme Court of the United States on the question of jurisdiction alone, by which order the court directed that all the papers, records and files in said action should be included in said record on appeal, and it now appearing that certain of the records in said action are not material upon said appeal:

Now, therefore, it is ordered, that the order heretofore made, be, and the same hereby is, modified and that the following papers may be omitted from the record on said appeal, to-wit: Exceptions to Answer for impertinence, Report of Master on Exceptions to Answer, Exceptions to Master's Report, Affidavit of D. W. Wallis on behalf of Complainant on motion for injunction, Affidavit of E. E. Pedlar on behalf of Complainant on motion for injunction, Affidavit of J. Lerory Nickel on behalf of Complainant on motion for injunction and Affidavit of F. P. McCray on on behalf
322 of Complainant on motion for injunction, and that the other papers, records and files in said suit be included in said Record on Appeal.

Dated July 31st, 1908.

OLIN WELLBORN,
District Judge, Holding the Circuit Court of the United States, Southern District of California, Northern Division.

(Endorsed:) No. 92. U. S. Circuit Court, Ninth Circuit, Southern District of California, Northern Division. Miller & Lux, Incorporated, Complainant, *vs.* East Side Canal & Irrigation Company, Defendant. Order modifying order respecting record on appeal. Filed Jul- 31, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

323 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California, Northern Division.

No. 92.

MILLER & LUX, INCORPORATED, Complainant;
vs.
EAST SIDE CANAL & IRRIGATION COMPANY, Defendant.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing Three hundred twenty-two (322) typewritten pages, numbered from 1 to 322 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the record and pleadings and of all proceedings and papers upon which the order and decree entered on the 4th day of May, 1908, was made, and also of the Conclusions of the court; the Court's Certificate as to question of jurisdiction and of the Assignment of Errors, Petition for Appeal, Order allowing Appeal and Bond on Appeal in the above and therein entitled cause, and that the same together constitute the Transcript of the Record on
324 Appeal to the Supreme Court of the United States in said cause. I do further certify that the cost of the foregoing record is $186.35 the amount whereof has been paid me by Miller & Lux, Incorporated, the Appellant in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 5th day of August, in the year of our Lord One Thousand Nine Hundred and Eight, and of the Independence of the United States the One Hundred and Thirty-third.

[Seal U. S. Circuit Court, Southern Dist. Cal., 1886.]

WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California,
By CHAS. N. WILLIAMS,
Deputy Clerk.

325 Supreme Court of the United States.

MILLER & LUX, INCORPORATED, Appellant,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY, Appellee.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said Appellant to docket the said cause with the Clerk of the Supreme Court of the United States at Washington,

District of Columbia, be, and the same hereby is, extended to and including the 1st day of September, 1908.

Dated at Los Angeles, July 15th, 1908.

OLIN WELLBORN, *Judge.*

326 [Endorsed:] No. —. Supreme Court of the United States. Miller & Lux, Incorporated, Appellant, *vs.* East Side Canal & Irrigation Company, Appellee. Order extending the time to docket the cause with the clerk of the Supreme Court of the United States.

Endorsed on cover: File No. 21,314. S. California C. C. U. S. Term No. 518. Miller & Lux, Incorporated, appellant, *vs.* East Side Canal & Irrigation Company. Filed August 22d, 1908. File No. 21,314.

No. 518.

OCTOBER TERM, 1908.

IN THE

SUPREME COURT

OF THE

UNITED STATES

MILLER & LUX, INCORPORATED,
Appellant,

vs.

EAST SIDE CANAL & IRRIGATION COMPANY,
Appellee.

MOTION TO ADVANCE AND SUBMIT CAUSE ON PRINTED BRIEFS; NOTICE OF MOTION, AND BRIEF OF APPELLANT.

Motion to advance and submit.

To the Honorable the Supreme Court of the United States:

Comes now the Appellant in the above entitled cause and moves the Court that said cause be advanced and submitted on printed briefs under rule thirty-two of this Court.

Said motion is made on the ground that said cause is brought to this Court by appeal under Section 5 of the Act of March 3, 1891, Chapter 517, and the only question in issue is the jurisdiction of the court below, said cause having been dismissed by said Court for want of jurisdiction.

EDWARD F. TREADWELL,
Solicitor for Appellant.

No. 518.

OCTOBER TERM, 1908.

IN THE

SUPREME COURT

OF THE

UNITED STATES

MILLER & LUX, INCORPORATED,
Appellant,

vs.

EAST SIDE CANAL & IRRIGATION COMPANY,
Appellee.

Notice of Motion.

To the Appellee in the above entitled cause and Mr. James F. Peck, its Solicitor:

You will please take notice that on Monday the 12th day of October, 1908, at the hour of 12 o'clock noon, or as soon thereafter as counsel can be heard, the Appellant will move said Court at the court room thereof at Washington, District of Columbia, to advance said cause and to submit the same on printed briefs as provided in rule 32 of said Court. A copy of said motion and a copy of Appellant's brief is served herewith.

EDWARD F. TREADWELL,
Solicitor for Appellant.

No. 518.

OCTOBER TERM, 1908.

IN THE

SUPREME COURT

OF THE

UNITED STATES

MILLER & LUX, INCORPORATED, (a Corporation),
Appellant,

vs.

THE EAST SIDE CANAL & IRRIGATION COMPANY, (a Corporation),
Appellee.

BRIEF OF APPELLANT.

Nature of the Case.

Appeal from a decree of the Circuit Court of the Southern District of California, Northern Division, dismissing Complainant's bill for want of jurisdiction. The Defendant made no express plea to the jurisdiction, but the answer (fols. 92-3) contained the following clause:

> "That the Complainant herein was organized as a corporation in the State of Nevada, as an agent of Miller & Lux, a corporation, organized under the laws of the State of California; and Miller & Lux, a corporation, so organized under the laws of the State of California, is the

owner of all the capital stock of the complainant; and complainant has no existence, except as a mere agency of Miller & Lux, a corporation, organized under the laws of the State of California; and all the property held by said complainant is as such agent; and so that suits may be brought and prosecuted in the United States courts; and said complainant does not transact any business or do any act or thing other than such as may be necessary to carry out the purposes of Miller & Lux, a corporation, organized under the laws of the State of California, except to hold title to property for the purpose of prosecuting suits in the United States courts."

The court, construing this as a plea to the jurisdiction, held that "the complainant has been improperly made a "party for the purpose of creating a case cognizable "under the Act of Congress in that behalf; and that said "suit does not really and substantially involve a dispute "or controversy between citizens of different states or "otherwise properly within the jurisdiction of this "Court." (See certificate, folio 303, and opinion, folios 184-194.)

The Facts.

Prior to 1887 Miller & Lux was a co-partnership, formed of Henry Miller and Charles Lux. Charles Lux died in 1887.

In April, 1897, the heirs of Charles Lux and Henry Miller entered into an agreement to form a corporation, to be known as Miller & Lux, under the laws of the State of California, and to transfer to it the property of said partnership, each of said persons to receive in lieu thereof capital stock of the corporation proportioned to his interest in the partnership. The purpose of the corporation was to liquidate the business and distribute the assets

of the partnership among the persons entitled thereto. (Fols. 251-265.) This corporation we will hereafter refer to as the California Corporation.

Pursuant to said agreement, the corporation of Miller & Lux was organized on May 5th, 1897, under the laws of the State of California, and all of the property of said co-partnership was conveyed to it, and the stock of the corporation distributed as provided in said agreement.

The property of Miller & Lux consisted mainly of real property situated in California, Nevada and Oregon. (Fol. 253.) The property in California was situated in many counties. One of the most valuable assets of the Company was certain water rights in the principal streams in the State. The San Joaquin River is a typical instance. The property of the Company riparian to or within the water shed of that river was situated in four different counties. In each of these counties is a separate superior court having jurisdiction of all matters affecting these water rights. (Const. of Cal., Art. VI, Sec. 5.) Moreover, any riparian owner on the river below could bring a proper action in the county where his land was situated for the purpose of enjoining a diversion of water above him. The reports of judicial decisions in the state are replete with actions of this nature. As necessarily would happen, what the court of one county might decide one day might be upset by the decision of the court of another county the next.

For the purpose of avoiding this conflict of jurisdiction, and also for other reasons, the interested parties before the California corporation was formed considered the advisability of incorporating under the laws of some other state than California, and at that time they consulted

their attorneys to find whether that could be done. All of the attorneys representing the parties interested advised that the corporation be formed under the laws of the State of New Jersey, but Mr. Miller objected and the matter was dropped and the corporation formed under the laws of the State of California. (Fol. 211.)

About four years after this, the matter was again taken up and the laws of Nevada were investigated, but found unsatisfactory, and the matter was allowed to drag until in 1903 the Legislature of the State of Nevada passed an act entitled "An Act providing a general corporation law," approved March 11, 1903. This act was intended to be very liberal and to encourage the incorporation of companies under the laws of that State, and it entirely removed the objections against the laws of other states. (Fols. 211, 220.)

The matter of the re-incorporation was then again taken up, and on June 12th, 1905, an agreement (fols. 222-5) was entered into between the California corporation and the stockholders thereof for the formation of a corporation under the laws of the State of Nevada, to be known as "Miller and Lux, Incorporated," and which will hereafter be called the Nevada Corporation. This agreement was as follows:

> " 'Miller & Lux,' a corporation, organized and existing under the laws of the State of California, and the undersigned stockholders owning and holding more than two-thirds of the capital stock of said corporation, do hereby jointly and severally agree with each other and with every stockholder of said corporation who may hereafter assent to this agreement and thereby become a party thereto, as follows:
>
> "WHEREAS, the laws of the State of California, under which said corporation 'Miller & Lux' is incorporated, are

unsatisfactory in many respects, among others in that they make the stockholders personally liable for the debts of the corporation, do not give to the stockholders as perfect immunity from corporate assessments as do the laws of the State of Nevada, and in that they allow taxation on a so-called corporate franchise, although all of the property of the corporation is taxed at its full value, and although said corporation has no franchise to do anything which every natural person may not lawfully do; and,

"WHEREAS, said laws of the State of California are in many particulars uncertain and unsettled, so that it is difficult to know with certainty what the powers and rights of the corporation, its directors and stockholders, are; and, particularly, as to dividends, a matter of the most vital importance to us, and as to which litigation is now pending and undetermined; and,

"WHEREAS, we believe that these difficulties do not exist to the same extent under the laws of the State of Nevada, and that those laws are in many other respects much better adapted than the laws of the State of California to accomplish the purposes for which said corporation was formed; and,

"WHEREAS, many of the tracts of land, and many of the canals, ditches, water-rights and other rights in real property owned and held by the said corporation 'Miller & Lux,' extend over several counties in the State of California adjacent to one another, so that in so far as such lands, canals, ditches, water-rights and other rights in real property are situated in one county they are, under the constitution and laws of the State of California, subject to the jurisdiction of the Superior Court in and for that County, and in so far as they are situated in another county are subject to the jurisdiction of the Superior Court in and for that county, and therefore, in the event of controversies or disputes over said lands, canals, ditches, water-rights, or other rights in real property, a multiplicity of litigation may arise, as it has in the past arisen, as to rights and interests of precisely the same character, in which diverse and conflicting decisions and determinations, both of law and of fact, may be made, to the great injury of those interested in said lands, canals, ditches, water-rights, and other rights; and

"WHEREAS, this result could not happen where the jurisdiction over the whole subject matter of litigation with all its collaterals would be in the same tribunal, and the rights of all parties there decided and determined, as would be the case if such litigation were in the Federal Courts; and

"WHEREAS, we believe that our rights in litigated cases would be most fully protected and conserved in the Federal Courts to which corporations formed in other states are entitled to resort:

"NOW THEREFORE, for the above reasons, and with a view of obtaining for ourselves and for all other stockholders of said corporation, the benefit of the laws of Nevada, which we believe give most favorable opportunities for carrying out the purposes for which said corporation was formed, we do hereby agree as follows:

"1. We will at once form a corporation under the laws of the State of Nevada, under the name of 'Miller & Lux, Incorporated,' with an authorized capital of $12,000,000. with Articles of Incorporation in the form and containing the provisions contained in the copy of the proposed Articles of Incorporation which is hereto annexed marked 'Exhibit A,' and with By-Laws, in the form and containing the provisions contained in the copy of the proposed By-Laws, which is hereto annexed, marked 'Exhibit B,' and each of the persons now members of the Board of Directors of 'Miller & Lux' shall be an incorporator, and shall subscribe to two shares of the capital stock of such proposed new corporation, to be issued as fully paid up.

"2. Said proposed new corporation is hereinafter referred to as the 'Nevada Corporation,' and said present corporation 'Miller & Lux,' as the 'California Corporation.'

"3. Immediately upon the incorporation of the Nevada corporation, said Nevada corporation shall, by resolution of its board of directors entered upon its minutes assent to all the terms and provisions of, and become a party to, this agreement, and agree to carry out the same; and, immediately thereupon, all the property real and personal of the California Corporation shall be transferred and conveyed by the California Corporation to the Nevada

Corporation in consideration of the issuance by the Nevada Corporation to the California Corporation of all the remainder of its capital stock, which shall be issued as fully paid up, and the assumption by the Nevada Corporation of all of the existing debts and liabilities and obligations of every kind, both legal and equitable, of the California Corporation; and the Nevada Corporation, immediately upon said transfer being made to it, shall by written agreement assume all the existing debts and liabilities and obligations of every kind, both legal and equitable, of the California Corporation.

"4. When said transfer and conveyance is completed, and as soon thereafter as the law will permit, the California Corporation shall be dissolved by voluntary proceedings under the Code of Civil Procedure of the State of California.

"5. And, inasmuch as it cannot be known how long a time may necessarily elapse before such dissolution can be effected, and it is claimed that under the law of California, until such dissolution is completed, the stock so to be issued to the California Corporation by the Nevada Corporation in consideration of such transfer, cannot be distributed among the stockholders of the California Corporation, and, therefore, in the meantime, the voting power on said stock would be in the Board of Directors of the California Corporation and could be exercised according to the will of a majority of said Board; and, inasmuch as the present minority stockholders of the California Corporation have guaranteed to them by an agreement dated April 8th, 1897, and by the Articles of Incorporation of the California Corporation, and now possess under said agreement and Articles of Incorporation, certain rights and privileges which it is the intention of all the parties hereto shall be preserved to said minority stockholders in the Nevada Corporation, undiminished and unimpaired, and to the same extent that they now possess said rights and privileges as stockholders in the California Corporation; and,

"WHEREAS said rights and privileges so possessed by said minority stockholders of the California Corporation might be diminished or impaired or taken away if the voting power of substantially all the stock of the Nevada

Corporation could be controlled as a unit by a majority of the Board of Directors of the California Corporation, or by a mere majority of the stockholders of the California Corporation; now, therefore, in consideration of the premises, and for the purpose of preserving said rights and privileges possessed by the minority stockholders of said California Corporation to them as the equitable owners of a minority of the stock of the Nevada Corporation, the legal title to which stock is to be distributed to them as soon as the California Corporation has been dissolved in accordance with the laws of California, it is agreed that, until such distribution is had, all the rights and privileges now possessed by the stockholders of the California Corporation shall be preserved to them and possessed by them as the equitable owners of the stock of the Nevada Corporation, undiminished and unimpaired and to the same extent that they possess said rights and privileges as stockholders in the California Corporation, and until such dissolution is had and the legal title to the stock of the Nevada Corporation is distributed to said stockholders of the California Corporation, each stockholder of the California Corporation shall, as the equitable owner of stock of the Nevada Corporation, have the right to attend any and all meetings of stockholders of the Nevada Corporation and shall have the right to vote cumulatively or otherwise, and be given by the Board of Directors of the California Corporation a proxy entitling him to vote, cumulatively or otherwise, the same proportionate number of shares of stock of the Nevada Corporation held by the California Corporation, as the shares of stock held by him in the California Corporation bear to the whole number of shares issued by the California Corporation, on all occasions at which stockholders of the Nevada Corporation shall have a right to vote; and the right of cumulative voting on all such occasions shall be guaranteed and preserved to said stockholders of the California Corporation as the equitable owners of the stock of the Nevada Corporation to the same extent as authorized and permitted to stockholders in and by the laws of Nevada relating to cumulative voting; and until such distribution is had, any stockholder of the California Corporation as the equitable owner of stock of the Nevada

Corporation shall be eligible to be elected to the office of director thereof to the same extent as if he held the legal title to said stock.

"And it is further agreed that if before such dissolution of the California Corporation is completed and before the legal title to the stock of the Nevada Corporation is distributed to the stockholders as aforesaid, any dividends are paid by the Nevada Corporation to the California Corporation as the holder of the legal title to the stock of the Nevada Corporation, such dividends shall immediately upon the receipt thereof be paid by the Directors of the California Corporation to the stockholders thereof, as the equitable owners of the stock of the Nevada Corporation.

"AND WHEREAS the California Corporation is indebted to some of the parties to this agreement upon promissory notes or open account, or both, it is agreed that as soon as said transfer is made by the California Corporation to the Nevada Corporation, any party to this agreement, or anyone who may become a party thereto as aforesaid, to whom any indebtedness is owing by said California Corporation, shall accept the obligation of the Nevada Corporation in lieu of that of the California Corporation, for said indebtedness, and in satisfaction and discharge thereof, and shall execute to the California Corporation a release of said indebtedness.

"Any stockholder of the California Corporation may by signing this agreement, or giving his assent thereto in writing, become a party hereto, and this agreement shall inure to the benefit of every stockholder of the California Corporation, whether he sign the same or assent hereto or not.

"This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto and of every person who may become a party hereto or acquire rights hereunder, and shall extend to the heirs, executors, administrators, successors and assigns of all the stockholders of the California Corporation, whether they sign or assent hereto or not."

The following testimony as to the matter is entirely uncontradicted (fols. 211, 220):

> "The laws of several states were examined [before the formation of the California corporation in 1897] and it was decided by all the attorneys who were engaged who represented the different interests, namely—Mr. Bishop [Thomas B. Bishop], Mr. Delmas [D. M. Delmas], Mr. Treadwell [W. B. Treadwell], Mr. Page [Charles Page] and myself to form a corporation under the laws of the state of New Jersey, and it was only after Mr. Miller objected that it was abandoned. Mr. Miller objected to forming it under the laws of any other state than California.
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> "Q. When was it taken up again?
>
> "A. It was taken up by me to the extent of having the laws of several states—I think particularly Nevada—investigated about—let's see I would not be certain, but about four years before it was finally incorporated in Nevada.
>
> "Q. And was consideration given to that from the time you took it up until the time the corporation was finally formed?
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> "A. Not actively or continuously. At that time I had Mr. Frohman report. He reported the State of Nevada's laws at that time were not favorable, and I abandoned it, although I discussed it several times after that but never to the extent I did then.
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> * * * * *
>
> "Subsequently the laws of the State of Nevada were amended so we deemed the laws of that state most favorable under which to form a corporation, and we then decided to incorporate our corporation under the laws of that state."

Immediately upon the formation of the Nevada Corporation all the property of the California corporation was transferred to the Nevada Corporation, the stock in the latter corporation was issued to the California corporation, with the voting power, however, vested in the stockholders thereof, and the Nevada corporation as-

sumed all the obligations of the California corporation. Since that time the California corporation has done no business whatever, and its actual dissolution has only been delayed by reason of the pendency of suits against it. (Fols. 206, 213-14.)

At the time of the formation of the Nevada corporation there was pending in the Superior Court of Merced County a suit by Miller & Lux, the California Corporation, against the East Side Canal & Irrigation Company, the defendant herein, to determine the extent of its right to divert water from the San Joaquin River. Upon the formation of the Nevada Corporation that suit was immediately dismissed and the present suit immediately filed in the United States Circuit Court.

Decision of the Circuit Court.

Under these facts the Court held that the transfer to the Nevada Corporation was without consideration; that the California corporation therefore had the right and power to compel the reconveyance of the property by the Nevada corporation to the California corporation, without a valuable consideration, and that therefore, the California corporation was the real party in interest, and the controversy was not really between citizens of different states. On the contrary we contend that the transfer was real and absolute, upon a valuable consideration, not for any temporary purpose, without any understanding express or implied that the property should ever be reconveyed, that no such reconveyance could be compelled, and consequently that the court should have retained jurisdiction.

Assignment of Errors.

I.

The Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division, erred in holding and deciding that the said Court has no jurisdiction to try and determine said suit and in rendering its decree dismissing the Bill therein on that ground.

II.

Said Court erred in deciding that the said Complainant had been improperly made a party for the purpose of creating a case cognizable under the Act of Congress in that behalf, and in holding and deciding that said suit does not really and substantially involve a dispute or controversy between citizens of different states.

ARGUMENT.

I.

The mere fact (if it be a fact) that complainant was formed and this property transferred to it for the purpose of conferring jurisdiction upon the Federal Courts, can in no way affect the jurisdiction of those courts.

This question has arisen in many different forms, and it has been uniformly held that the motive of the complainant in invoking Federal jurisdiction is immaterial. A person may change his residence from one state to another so as to become a citizen of the latter state within the meaning of the law defining the jurisdiction of the Federal Courts, or may transfer to a citizen of another state a right of action, so as to enable the latter to sue in the Federal Courts, even although in either case his only purpose be to confer jurisdiction upon the Federal Courts. If the change of residence be actual or the transfer be real, so as to vest the whole legal and beneficial title in the transferee, the motive is immaterial.

Dickerman v. *Northern Trust Co.*, 176 U. S. 181, 191, 44 L. ed. 423, 430;

McDonald v. *Smalley*, 1 Pet. 620; 7 L. ed. 287;

Smith v. *Kernochen*, 7 How. 198, 216; 12 L. ed. 666;

Barney v. *Baltimore*, 6 Wall. 280; 18 L. ed. 825;

Morris v. *Gilmer*, 129 U. S. 315, 328; 32 L. ed. 690, 694;

Cross v. *Allen*, 141 U. S. 528, 533; 35 L. ed. 843, 847;

Crawford v. *Neal*, 144 U. S. 585; 36 L. ed. 552;
Lake County Commissioners v. *Dudley*, 173 U. S. 243, 254; 43 L. ed. 684, 689;
South Dakota v. *North Carolina*, 192 U. S. 286, 310; 48 L. ed. 448;
Blair v. *Chicago*, 201 U. S. 400, 448; 50 L. ed. 801, 821;
Briggs v. *French*, Fed. Cas. No. 1871;
Case v. *Clarke*, Fed. Cas. No. 2490;
Van Dolsen v. *N. Y.*, 17 Fed. 817;
Neal v. *Foster*, 36 Fed. 29, 41;
Ashley v. *Supervisors*, 83 Fed. 534, 537;
Woodside v. *Ciceroni*, 93 Fed. 1;
Collins v. *Ashland*, 112 Fed. 175, 178;
Adams v. *Shirk*, 117 Fed. 801, 805;
Cole v. *Ry. Co.*, 140 Fed. 944, 946.

II.

The transfer to the Nevada corporation was upon a valuable consideration, and consequently no trust resulted in favor of the California corporation.

The true test by which to determine whether a transfer is real or colorable is whether "the intention was that the "title should remain in the corporation," or whether a "reconveyance to [the grantor] was contemplated."

Irvine Co. v. *Bond*, 74 Fed. 849, 854.

In the case at bar it is not claimed that there is the least evidence or circumstance from which the inference could be drawn that the parties *in fact* intended that the property should ever be reconveyed to the California corpora-

tion. But the learned judge of the court below held that the California corporation had the *right* and power to compel a reconveyance at any time, and from this evidently felt that he was *bound* to infer an agreement to reconvey under his interpretation of the *Lehigh*[1] case hereafter referred to.

This conclusion was apparently based on the ground that there was no consideration for the transfer to the Nevada Corporation, and consequently a trust resulted in favor of the California Corporation, which was therefore entitled to a reconveyance on demand. It will be noted that this entire conclusion is based on the premise that the conveyance was without consideration, *and this the trial court assumes without any discussion whatever.* To us it is clear that there were at least four distinct considerations for the transfer to the Nevada corporation, viz:

1. The issuance of stock in that corporation in lieu of the property conveyed.

2. The assumption by the Nevada corporation of all the debts and obligations of the California corporation.

3. The advantages obtained by the stockholders in the California corporation by the conveyance to the Nevada corporation, which are recited in the agreement.

4. The mutual agreement of the California corporation and its various stockholders granting their consent to the transfer was a consideration as between them for the transfer.

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[1] *Lehigh Min. & Manfg. Co.* v. *Kelly,* 160 U. S. 327, 40 L. ed. 444.

These considerations seem to us so ample to refute any presumption that a trust should result in favor of the grantors that we will not further argue the matter, except to say that the case is not materially different from the everyday practice of a number of joint owners of property conveying the property to a corporation in consideration of the issuance of stock in the corporation. If such transactions should be held to be without consideration, then thousands of corporations could be wrecked by dissatisfied stockholders demanding back their property on the ground that there was no consideration for the transfer. We do not believe that this Court has ever intended to lay down a rule which would prevent a corporation so formed from resorting to the Federal Courts.

But beyond this, the doctrine of resulting trusts has no possible application for many reasons: First, because when a deed declares a beneficial use to the grantee it will prevent a trust resulting in favor of the grantor, although there was no valuable consideration to support the conveyance.

15 Am. & Eng. Ency. of Law, (2nd Ed.), p. 1125.

Secondly, when the conveyance recites a consideration this is conclusive that the grantee is to take a beneficial estate.

15 Am. & Eng. Ency. of Law, (2nd Ed.), p. 1125.

So there can be no resulting trust when a deed is executed in pursuance of a written agreement.

St. John v. *Benedict,* 6 John. Ch. (N. Y.) 111.

Finally, under the law of the State of California where this transaction took place a written agreement is presumptive evidence of a consideration.

Civil Code of Cal., Sec. 1614.[2]

It is perfectly obvious, therefore, that neither the California corporation nor the stockholders thereof have a right to compel a reconveyance of the property, and therefore, the entire foundation for the decision of the trial court is destroyed.

III.

The dissolution or non-dissolution of the California corporation is entirely immaterial.

By the agreement for the formation of the Nevada corporation it was provided (fol. 225) that

> "When said transfer and conveyance is completed, and as soon thereafter as the law will permit, the California corporation shall be dissolved by voluntary proceedings under the Code of Civil Procedure of the State of California."

Under the provisions of the law referred to a corporation can only be dissolved when "all claims and demands

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[2] "A written instrument is presumptive evidence of a consideration." Civil Code of Cal., Sec. 1614.

"against the corporation have been satisfied and dis-
"charged."

Code of Civil Procedure of Cal., Sec. 1228.[3]

At the time of the transaction there were certain actions pending against the California corporation which prevented its dissolution.[4] In view of this fact, the agreement contained the following provision (fols. 225-7):

> "4. When said transfer and conveyance is completed, and as soon thereafter as the law will permit, the California Corporation shall be dissolved by voluntary proceedings under the Code of Civil Procedure of the State of California.
>
> "5. And, inasmuch as it cannot be known how long a time may necessarily elapse before such dissolution can be effected, and it is claimed that under the law of California, until such dissolution is completed, the stock so to be issued to the California Corporation by the Nevada Corporation in consideration of such transfer, cannot be distributed among the stockholders of the California Corporation, and, therefore, in the meantime, the voting power of said

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[3] "§ 1227. A corporation may be dissolved by the Superior Court of the County where its principal place of business is situated upon its voluntary application for that purpose.

"§ 1228. The application must be in writing, and must set forth: * * *

"2. That all claims and demands against the corporation have been satisfied and discharged."

[4] It should be noted that the agreement for a dissolution of the California Corporation was signed by all of the stockholders therein except one holding 7500 shares out of 120,000 shares, or a little more than six per cent thereof; that she was represented by the same attorney who conducts this litigation against the corporation, and that the actual dissolution of the corporation has been prevented only by reason of a suit by her against it, which has since been decided adversely to her. (*Baldwin* v. *Miller & Lux*, 92 Pac. 1030.) See Folios 213-14.

stock would be in the Board of Directors of the California Corporation and could be exercised according to the will of a majority of said Board; and, inasmuch as the present minority stockholders of the California Corporation have guaranteed to them by an agreement dated April, 1897, and by the Articles of Incorporation of the California Corporation, and now possess under said agreement and Articles of Incorporation, certain rights and privileges which it is the intention of all the parties hereto shall be preserved to said minority stockholders in the Nevada Corporation, undiminished and unimpaired, and to the same extent that they now possess said rights and privileges as stockholders in the California Corporation; and,

"WHEREAS said rights and privileges so possessed by said minority stockholders of the California Corporation might be diminished or impaired or taken away if the voting power of substantially all the stock of the Nevada Corporation could be controlled as a unit by a majority of the Board of Directors of the California Corporation, or by a mere majority of the stockholders of the California Corporation; now, therefore, in consideration of the premises, and for the purpose of preserving said rights and privileges possessed by the minority stockholders of said California Corporation to them as the equitable owners of a minority of the stock of the Nevada Corporation, the legal title to which stock is to be distributed to them as soon as the California Corporation has been dissolved in accordance with the laws of California, it is agreed that, until such distribution is had, all the rights and privileges now possessed by the stockholders of the California Corporation shall be preserved to them and possessed by them as the equitable owners of the stock of the Nevada Corporation, undiminished and unimpaired and to the same extent that they possess said rights and privileges as stockholders in the California Corporation, and until such dissolution is had and the legal title to the stock of the Nevada Corporation is distributed to said stockholders of the California Corporation, each stockholder of the California Corporation shall, as the equitable owner of stock of the Nevada Corporation, have the right to attend any and all meetings of stockholders of the Nevada Corporation and shall have the right to vote cumulatively or other-

wise, and be given by the Board of Directors of the California Corporation a proxy entitling him to vote, cumulatively or otherwise, the same proportionate number of shares of stock of the Nevada Corporation held by the California Corporation, as the shares of stock held by him in the California Corporation bear to the whole number of shares issued by the California Corporation, on all occasions at which stockholders of the Nevada Corporation shall have a right to vote; and the right to cumulative voting on all such occasions shall be guaranteed and preserved to said stockholders of the California Corporation as the equitable owners of the stock of the Nevada Corporation to the same extent as authorized and permitted to stockholders in and by the laws of Nevada relating to cumulative voting; and until such distribution is had, any stockholder of the California Corporation as the equitable owner of stock of the Nevada Corporation shall be eligible to be elected to the office of director thereof to the same extent as if he held the legal title to said stock.

"And it is further agreed that if before such dissolution of the California Corporation is completed and before the legal title to the stock of the Nevada Corporation is distributed to the stockholders as aforesaid, any dividends are paid by the Nevada Corporation to the California Corporation as the holder of the legal title to the stock of the Nevada Corporation, such dividends shall immediately upon the receipt thereof be paid by the Directors of the California Corporation to the stockholders thereof, as the equitable owners of the stock of the Nevada Corporation."

The recital that the stock of the Nevada Corporation could not be distributed to the stockholders of the California Corporation prior to dissolution correctly states the law.

Kohl v. *Lilienthal,* 81 Cal. 378.

The provision, also, that the voting power of the stock should be separated from the legal title and vested in the

stockholders of the California Corporation is entirely valid under the law of the State of California.

Smith v. *S. F. & N. P. Ry. Co.*, 115 Cal. 584.

It follows from this that the California corporation was as effectually eliminated as if it had been absolutely dissolved. In determining whether there was an agreement to reconvey to the California corporation, the actual dissolution of that corporation would probably be evidence that no such reconveyance was contemplated; but we entirely fail to see how the mere continued existence of the corporation as a legal entity can be any evidence of a contrary intention. If such an intention did exist, and a right existed in the corporation to demand a re-conveyance, this right would not cease by the dissolution of the corporation, but would vest in the trustees of the corporation appointed to liquidate its affairs, and ultimately in the stockholders. If then the court is right in holding that this right to a reconveyance did exist, it might be argued with equal force that it will continue to exist notwithstanding the dissolution of the corporation. The actual dissolution would not change the legal status of the transaction in any way, any more than would the death of an individual grantor in whom was vested the right to demand a reconveyance. Neither the legal death of the corporation, nor the physical demise of the individual could in any way affect the right to the reconveyance, and it is therefore a false quantity which should be ignored. If the decision in this case be correct, this corporation, it might well be urged, is not only a perpetual outlaw from the Federal Courts, but any stockholder of the California Corporation could at any time compel it to reconvey the property to the California Corporation.

IV.

The transfer to the Nevada corporation was an absolute one, without any understanding, express or implied, that the property should ever be reconveyed, and the case of Lehigh Min. & Manfg. Co. v. Kelly, 160 U. S. 327, 40 L. ed. 444, has no application to such a transfer.

It is upon the *Lehigh* case that the appellee and the Circuit Court base the claim that the court is without jurisdiction. In that case the Court reviewed a number of the previous decisions of this court to which we have referred, and then said:

> "None of these cases sustain the contention of the plaintiffs. All of them concur in holding that the privilege of a grantee or purchaser of property being a citizen of one of the states, to invoke the jurisdiction of a circuit court of the United States for the protection of his rights as against a citizen of another state—the value of the matter in dispute being sufficient for the purpose—cannot be affected or impaired merely because of the motive that induced his grantor to convey, or his vendor to sell and deliver, the property, provided such conveyance or such sale or delivery was a real transaction by which the title passed without the grantor or vendor reserving or having any right or power to compel or require a reconveyance or return to him of the property in question. We adhere to that doctrine."

This case, therefore, in no way changed the law on this subject, but reaffirmed the law that the only case where jurisdiction would be refused is where there is an express or implied agreement to reconvey. There may be room for some doubt as to whether the court was at liberty to assume such agreement from the facts in that case, and

it was the difference of opinion on this subject, rather than any difference as to the point of law involved, that caused the dissent in that case. When, however, the question is whether such an agreement is to be implied from certain facts, each case must necessarily be judged from its own facts. It is seldom where parties form a corporation and transfer property to it temporarily, with the understanding that it shall be reconveyed after the termination of the litigation, that there will be any *express* agreement for such reconveyance. The court must necessarily find such an intention from all the surrounding circumstances connected with the transaction. It was never intended by this court to decide that in every case where parties convey property to a corporation of which they are the sole stockholders, there is necessarily an understanding that it shall be reconveyed, simply because the stockholders have the *power* to make a reconveyance. Our experience shows that this is not the fact, and to adopt such a rule would bar thousands of honest corporations from the courts. The court on the other hand is not to be imposed upon by any ingenious scheme where the transaction is clearly not real, and the transfer clearly not absolute. The question in this case is simply this: taking all the facts and circumstances shown in evidence, is it fair to assume that the transfer of this property to the Nevada corporation was simply a temporary expedient for the purpose of this case and with an understanding that a reconveyance should be made upon its termination? If so, the bill was properly dismissed; otherwise not. We confidently assert that no such inference can possibly be drawn from the facts. Let us take up the facts which show a contrary intention.

1. The formation of the Nevada corporation was considered as early as 1897, before the formation of the California corporation and before the initiation of the litigation with this defendant in the State court. (Fol. 211.)

2. Nothing was ever done in the case in the state court and there is no showing that any adverse decision was rendered against us in the state court, or that we had any reason to expect an adverse decision therein. On the contrary, the Supreme Court of California has uniformly upheld the rights of riparian owners, in which capacity appellant claimed in that case.[5]

3. It appears that this corporation, which is capitalized at Twelve Million Dollars ($12,000,000) and owns thousands of acres of real estate in many counties of the State and in several states, transferred its entire property to appellant. It is almost inconceivable that such a radical action would be taken as a mere temporary expedient. The mere fees of the secretary of the State of Nevada were more than $1300.00[6] and the fees of the Secretary of the State of California were more than $1200.00[7] for merely filing the Articles of Incorporation. The task of drawing deeds of all this property, to say nothing of the

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[5] Defendants attempted to show that the reason for the change was the decision in a case entitled *"Stevinson* v. *San Joaquin & Kings River Canal & Irrigation Company,"* but this is entirely unfounded, because the decision in that case was not rendered until many months after the formation of the new corporation, and was a very favorable decision to the interests of this appellant.

[6] "An act providing a general corporation law," approved March 16, 1903, Stats. Nevada 1903, Sec. 102.

[7] Political Code of California, Sec. 416.

many changes made necessary in every department of a great business, was monumental and clearly shows that no reasonable business man would undertake such a task for a mere temporary purpose.

4. One of the avowed objects of the transfer, and the one upon which the trial court largely bases its decision, could not be accomplished by a temporary transfer. This object is thus stated in the agreement (fol. 223):

> "WHEREAS, many tracts of land, and many of the canals, ditches, water-rights and other rights in real property owned and held by the said corporation 'Miller & Lux,' extend over several counties in the State of California adjacent to one another, so that in so far as such lands, canals, ditches, water-rights and other rights in real property are situated in one county they are, under the constitution and laws of the State of California, subject to the jurisdiction of the Superior Court in and for that County, and in so far as they are situated in another county are subject to the jurisdiction of the Superior Court in and for that county, and therefore, in the event of controversies or disputes over said lands, canals, ditches, water-rights, or other rights in real property, a multiplicity of litigation may arise, as it has in the past arisen, as to rights and interests of precisely the same character, in which diverse and conflicting decisions and determinations, both of law and of fact, may be made, to the great injury of those interested in said lands, canals, ditches, water-rights, and other rights; and
>
> "WHEREAS, this result could not happen where the jurisdiction over the whole subject matter of litigation with all its collaterals would be in the same tribunal, and the rights of all parties there decided and determined, as would be the case if such litigation were in the Federal Courts; and
>
> "WHEREAS, we believe that our rights in litigated cases would be most fully protected and conserved in the Federal Courts to which corporations formed in other states are entitled to resort:"

It is clear that the permanent benefit of this preference for Federal jurisdiction could only be obtained by the permanent maintenance of the Nevada corporation. How then can the court imply an intention to make a reconveyance from an avowed purpose, when such a reconveyance would be destructive of that very purpose?

5. The fact that it was agreed that the California corporation should be dissolved and that it was shorn of all property and business by the transfer entirely differentiates this case from the *Lehigh* case where simply one parcel of land was conveyed to a corporation which was transacting no business and the grantor corporation continued in business as theretofore.

6. The mere fact that the agreement openly avowed its real purpose, should commend it to the court and we know of no rule which will permit the court to accept the admissions of the agreement as proof of a fact inconsistent with the admission itself. The admission is that the parties preferred the jurisdiction of the Federal Court. If they preferred it, then they necessarily would desire to maintain it, and no reason can be imagined why they should ever desire to reconvey the property to the California Corporation, and thus destroy the very object which they admittedly sought to accomplish.

7. The fact that the voting power of the stock of the Nevada corporation was given to the stockholders of the California Corporation took away the *power* of the California corporation as such to compel a reconveyance, and showed an intention to substitute the Nevada corporation permanently in place of the California Corporation.

8. Besides the object above referred to, it appears that the parties had reasons for incorporating under the laws of Nevada, other than the purpose of obtaining the right to resort to the Federal Courts. The agreement contains the following recitals (fol. 222):

> "WHEREAS, the laws of the State of California, under which said corporation 'Miller & Lux' is incorporated, are unsatisfactory in many respects, among others in that they make the stockholders personally liable for the debts of the corporation, do not give to the stockholders as perfect immunity from corporate assessments as do the laws of the State of Nevada, and in that they allow taxation on a so-called corporate franchise, although all of the property of the corporation is taxed at its full value, and although said corporation has no franchise to do anything which every natural person may not lawfully do;[8] and,
>
> "WHEREAS, said laws of the State of California are in many particulars uncertain and unsettled, so that it is difficult to know with certainty what the powers and rights of the corporation, its directors and stockholders, are; and particularly, as to dividends, a matter of the most vital importance to us, and as to which litigation is now pending and undetermined;[9] and
>
> "WHEREAS, we believe that these difficulties do not exist to the same extent under the laws of the State of Nevada, and that those laws are in many other respects much better adapted than the laws of he State of California to accomplish the purposes for which said corporation was formed;"

If these reasons were genuine they certainly could only be accomplished by a *permanent* transfer of the property. The circuit court attempts to avoid this result by holding

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[8] *Bank of California* v. *San Francisco*, 142 Cal. 276; *San Joaquin & Kings River C. & I. Co.* v. *Merced County*, 2 Cal. App. 593.

[9] *Baldwin* v. *Miller & Lux*, 92 Pac. 1030.

that these recitals are self-serving and not evidence. For the purpose of showing the object of the transfer, which on its face was absolute, the *defendant* introduced this agreement. When introduced as an admission it was certainly *evidence* of the admissions contained therein. Even if the complainant could not have introduced it for the purpose of establishing that these were the purposes of the transfer, and also admitting that defendant in introducing it might have offered merely the admission which it considered against our interest, still this will not aid defendant, for it did not do so, but introduced the entire agreement. Even if it had only offered part, we would have been entitled to the whole, on the ground that when part of a conversation or instrument is offered by one party the other is entitled to introduce and have the benefit of the balance, and if the balance changes, overcomes, weakens or explains the part offered it must be given effect.

Code of Civil Procedure of Cal., Sec. 1854;
1 *Am. & Eng. Ency. of Law*, (2nd ed.), p. 721.

But as a matter of fact the recitals of this agreement were admissible in evidence in our favor as well as against us. Where a declaration forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration is evidence as part of the transaction and is not hearsay.

Code of Civil Procedure of Cal., Sec. 1850;
24 *Am. & Eng. Ency. of Law*, (2d ed.), p. 672.

So declarations accompanying the delivery of property, or taking possession of property, showing the intent

or purpose of such taking or otherwise qualifying the act are admissible as part of the *res gestæ*.

24 Am. & Eng. Ency. of Law, (2nd ed.), pp. 674-5.

These rules are elementary and it therefore follows that if defendant wished to disprove or discredit these recitals the burden was on it to do so, and not having attempted to do so these recitals are conclusive evidence of the intention of the parties in making the transfer.

9. The facts in the *Lehigh* case are entirely different from the facts in this case. In that case there was a bare transfer, without consideration, of one piece of property of the corporation; the old corporation continued in business as theretofore; the new corporation had no business and the transfer was not made with the object that it should transact any business, but solely for the purpose of conferring jurisdiction of a particular case involving that property on the Federal Court. When as there it was admitted that the transfer was only for a particular purpose, the court might well assume that upon the accomplishment of that purpose the property would be reconveyed. There a reconveyance would accomplish the purpose, here it would be destructive of the purpose. There no consideration, here a valuable consideration; there the old corporation still doing business, here the old corporation extinct; there the transfer made in view of a particular case, here the transfer contemplated long before this case was thought of; there the very property involved in litigation alone transferred, here millions of dollars of property not affected by the litigation transferred; there the new corporation in no active business, here the new corporation doing all the business of the

old; there the sole purpose to confer jurisdiction on the Federal Court of a particular case; here the purposes varied and unconnected with any particular case.

The transaction in the Lehigh case under the stipulation of the parties was entered into solely for the purpose of conferring jurisdiction upon the Federal Courts in a case involving the title to a specific piece of property. No consideration was shown or claimed. That part of the stipulation wherein it was agreed that the property was transferred to the Pennsylvania corporation solely for the purpose of bringing and prosecuting the action in the Federal Court was held to control the paragraph of the stipulation wherein it was stipulated that the title was conveyed in fee to the Pennsylvania corporation, and by the opinion of the majority and the dissenting opinion of the minority the situation was emphasized that it was upon this paragraph of the stipulation that the case turned, it being held that if the property was transferred to the Pennsylvania corporation solely for the purpose of bringing and prosecuting the litigation, it must be assumed that upon the accomplishment of that purpose the property would be reconveyed. As we have already pointed out and shown by the authorities, the learned Judge below fell into the error of excluding from consideration all of those portions of the agreement providing for the incorporation of the new corporation which showed reasons and considerations other than those connected with the litigation, and also ignored the valuable considerations for the transfer. In the Lehigh case by the very terms of the stipulation, it was made to appear without dispute that an incidental piece of property was transferred to the Pennsylvania corporation for the sole

purpose of bringing and prosecuting an action in the Federal Court, and by the language of the stipulation the idea was included that even as to this property the Pennsylvania corporation would not otherwise manage or deal with the property except to prosecute the suit, leaving all other duties concerning even this piece of property with the original corporation.

It appears without dispute in the evidence, that the original co-partnership of Miller & Lux owned property in the States of California, Nevada and Oregon; that in the first instance the attorneys considered the propriety of organizing a corporation in some state other than any of the three states named, and advised that this should be done, and this would have been done except for the fact that Mr. Miller, the managing partner, insisted upon incorporating in California. No question could have been raised if the corporation had been formed as advised by the attorneys of the interested parties in some state other than the three states in which the property of the co-partnership was situated, and it was obviously a matter of business consideration, convenience and advantage also as to which one of these three states should be selected from which to obtain the corporate charter. The practical effect of the opinion of the Court below would be that California having been selected for that purpose the question could not again be raised or considered, at least not pending any litigation present or prospective. It is also without dispute in the evidence that after the California corporation was formed the question of obtaining a charter from some other state was from time to time considered, and finally in view of the favorable and satisfactory condition of the laws of Nevada a new

corporation was formed and a charter obtained from that State. It thereupon became a matter suitable and lawful for the consideration of the California corporation, its stockholders and directors, whether it would be to the advantage of the California corporation and its stockholders to transfer its property to the Nevada corporation and accept the stock of the latter corporation as a consideration therefor, it being a plain question of business as to whether or not the best interests of the stockholders of the California corporation would be served by conveying the property to the Nevada corporation in exchange for its stock. It is evident not only from the terms of the binding agreement, but from the facts and circumstances, that such a conveyance to the Nevada corporation with all of its attendant expenses, labor and difficulties was of necessity in good faith and permanent. Instead of merely taking over the property for the sole purpose of prosecuting an action in the Federal Court, the Nevada corporation issued its stock therefor, assumed the obligations of the old company, and the burdens, liabilities, expenses and profits of the full management of all of the extensive and diversified properties thus conveyed to it. It is conceded that the parties took into consideration the fact that after the transfer of the property to the Nevada corporation actions could be prosecuted and defended in the Federal Courts. Presumably no person owning property and no corporation owning property would consider a transaction involving the formation of a corporation under the laws of another state without considering this phase of the situation, and the effect of its domicile upon pending or future litigation. The right to do this is of course admitted in all of the authorities. It is easy to point out

and establish in any case the existence of such motive, because it would always exist either by expression or implication; but we are at a loss to see how the Court could first hold that this motive was legally unimportant and then hold that it was sufficient to overcome all the considerations for the transfer which were established without dispute.

The evidence shows without dispute the existence of the complainant as a Nevada corporation with a charter from that State, and the transfer to it of the property under a permanent and binding agreement and in consideration of its capital stock and other obligations which it had assumed and the advantages which it possessed of a very extensive and important character. It is in full charge of this property and is exercising ownership and dominion over it; it holds, uses and enjoys it for every lawful purpose. Accepting the terms of the contract, or accepting the undisputed evidence of the transaction itself, the nature and extent thereof, the absolute change of ownership and control, there is no competent evidence that in any manner impeaches the transaction.

Under the stipulation in the Lehigh case it was held that a reconveyance of the property to the original corporation could be compelled, and the learned Judge below seemed to infer that the same results would follow here. In view, however, of the contract entered into and the considerations therefor, we think upon reflection it would not be seriously urged that either the California corporation or one of its stockholders would have any standing in a court of law or equity to compel a reconveyance in this case. If such reconveyance could not be compelled, undeniably the Court had jurisdiction. Cer-

tainly if an action for a reconveyance were submitted upon the evidence before the Court in this case, it could not be considered possible that the complainant would be entitled to a decree.

V.

It matters not how closely related two corporations may be, nor what similarity there may be in names, incorporators, stockholders, officers and purposes, they will be considered distinct so far as Federal jurisdiction is concerned.

This rule is fully established by the decisions of this court.

Louisville etc. Co. v. *Louisville,* 174 U. S. 552, 563; L. ed., 1081, 1089;

St. Louis v. *James,* 161 U. S. 545, 559; 40 L. ed., 802, 807;

Lehigh M. & M. Co. v. *Kelly,* 160 U. S. 327, 347; 40 L. ed., 444, 451;

Nashua & L. R. Corp. v. *R. Corp.,* 136 U. S. 356, 373; 34 L. ed., 363, 367, 368, 370;

Muller v. *Dows,* 94 U. S. 444; 24 L. ed. 207, 208;

Goodwin v. *New York etc. Co.,* 124 Fed. 358, 364;

Missouri P. Ry. v *Meeh,* 69 Fed. 753, 755;

Farnham v. *Canal Corp.,* 1 Sumn. 46, 62; Fed. Cas. No. 4,675;

Racine etc. Co. v. *Farmers etc. Co.,* 49 Ill. 331.

In *Nashua etc. Corp.* v. *Railroad Corporation, supra,* one of the, if not the, leading case upon the subject, the court per Mr. Justice Field, say:

> "The new corporation created by Massachusetts, though bearing the same name, composed of the same

stockholders and designed to accomplish the same purposes, is not the same corporation with the one in New Hampshire. Identity of name, powers and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies can properly be said to owe their existence to both. To each statute and to the corporation created by it there can be but one legislative paternity.

* * *

"There are many decisions both of the federal and state courts which establish the rule that however closely two corporations of different states may unite their interests, and though even the stockholders of the one may become the stockholders of the other and their business be conducted by the same directors, the separate identity of each as a corporation of the state by which it was created, and as a citizen of that state, is not thereby lost. [Here follows a discussion of the leading authorities.]

* * *

"The union of name, of officers, of business and of property does not change their distinctive character as separate corporations."

In *Muller* v. *Dows, supra,* the court say:

"Still, it is argued on behalf of the appellants that the Chicago and Southwestern Railway Company cannot claim to be a corporation created by the State of Iowa, because it was formed by a consolidation of the Iowa Company with another of the same name, chartered by the laws of Missouri, the consolidation having been allowed by the statutes of each state. Hence it is argued the corporation was created by the laws of Iowa and of Missouri, and as Burnes, one of the plaintiffs, is a citizen of Missouri, it is inferred the circuit court had no jurisdiction. We cannot assent to this inference. It is true the provisions of the statutes of Iowa, respecting railroad consolidation, of roads within the state with others outside of the state, were that any railroad company, organized under he laws of the state, or that might thus be organized, should have power to intersect, join and unite their railroads constructed or to be constructed in the

state, or in any adjoining state, at such point on the state line, or at any other point, as might be mutually agreed upon by said companies; and such railroads were authorized to 'merge and consolidate the stock of the' respective companies, making one joint-stock company of the 'railroads thus connected.' The Missouri statutes contained similar provisions; and with these laws in force the consolidation of the Chicago and Southwestern railways was effected. The two companies became one. But in the State of Iowa that one was an Iowa corporation, existing under the laws of that state alone. The laws of Missouri had no operation in Iowa. It is, however, unnecessary to discuss this subject further. Doubt in regard to it is put at rest by the decision of this court in *R. Co.* v. *Whitton,* 13 Wall. 270 (80 U. S. 571). There a similar question arose. A suit was brought by a citizen of Illinois in the State of Wisconsin, and it became a question whether the Federal Circuit Court of the latter state could entertain jurisdiction. The railroad company, sued at first in the state court, resisted an application to remove the case into the United States Circuit court, on affidavits that it was a corporation created by and existing under the laws of the state of Illinois, Wisconsin and Michigan; that its line of railway was located, in part, in each of these states; that its entire line of railway was managed and controlled by the defendant as a single corporation; that all its powers and franchises were exercised, and its affairs managed and controlled by one Board of Directors and officers; that its principal office and place of business was at the City of Chicago, in the State of Illinois, and that there was no office for the control or management of the general business and affairs of the corporation in Wisconsin. Nevertheless, the circuit court took jurisdiction of the case; and this court held correctly, remarking that 'The 'defendant is a corporation, and as such a citizen of Wis- 'consin by the laws of that state. It is not there a cor- 'poration or citizen of any state. Being there sued, it 'can only be brought into court as a citizen of that state, 'whatever its status or citizenship may be elsewhere.' In the view of this decision, it must be held that the objection to the jurisdiction of the Circuit Court of Iowa is unsustainable."

In *Goodwin* v. *New York etc. Co., supra,* the court say:

> "'There are many decisions both of the federal and 'state courts which establish the rule that, however closely 'two corporations of different states may unite their inter-'ests, and though even the stockholders of the one may 'become the stockholders of the other, and their business 'be conducted by the same directors, the separate identity 'of each, as a corporation of the state by which it was 'created, and as a citizen of that state, is not thereby lost.' 136 U. S. 375, 10 Sup. Ct. 1008, 34 L. ed. 363."

In *Missouri P. Ry.* v. *Meeh, supra,* the court say:

> "At this day it must be regarded as settled beyond doubt or controversy that two states of this Union cannot by their joint action create a corporation which will be regarded as a single corporate entity, and for jurisdictional purposes, a citizen of each state which joined in creating it. One state may create a corporation of a given name, and the legislature of an adjoining state may declare that the same legal entity shall be or become a corporation of that state as well, and be entitled to exercise within its borders, by the same board of directors and officers all of its corporate functions. Nevertheless, the result of such legislation is not to create a single corporation of the same name, having a different paternity."

We respectfully submit that there is no evidence from which the deduction can possibly be drawn that this transfer was merely a temporary one with an understanding express or implied that the property should be reconveyed, and consequently the decree should be reversed.

EDWARD F. TREADWELL,
Solicitor for Appellant.

Office Supreme Court, U
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JAMES H. McKENN
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No. 518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908

MILLER & LUX, Incorporated, a Corporation,
Appellant,

vs.

EAST SIDE CANAL AND IRRIGATION COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLEE.

JAMES F. PECK,
Solicitor for Appellee.

F. D. McKENNEY,
Of Counsel.

THE JAMES H. BARRY CO.
1122-1124 Mission St.

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OCTOBER TERM, 1908.

MILLER & LUX, INCORPORATED, A CORPORATION,
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EAST SIDE CANAL AND IRRIGATION COMPANY, A CORPORATION,
Appellee.

No. 518.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The appeal is from the decree of the Circuit Court dismissing complainant's bill, because: (1) said suit does not really and substantially involve a dispute or controversy within the jurisdiction of said Circuit Court, and (2) the complainant has been collusively made a party plaintiff to this suit for the purpose of

creating a case cognizable by said Circuit Court. (See Decree, fols. 181-182, and Certificate of Court, fol. 308, and Opinion of Court, fols. 184-194.)

The suit was brought to litigate certain alleged water rights, and to enjoin the diversion of waters to the prejudice of complainant as a riparian owner. Diversity of citizenship is the only ground relied upon to make out a case for Federal jurisdiction, the complainant being a Nevada corporation and the defendant being a corporation domiciled in the State of California.

The defendant filed an answer and cross-bill in each of which it is stated "that the complainant here-
" in was organized as a corporation of the State of
" Nevada, as an agent of Miller & Lux, a corpora-
" tion, organized under the laws of the State of Cali-
" fornia; and Miller & Lux, a corporation, so organ-
" ized under the laws of the State of California, is
" the owner of all the capital stock of the complain-
" ant, and complainant has no existence, except as a
" mere agency of Miller & Lux, a corporation, or-
" ganized under the laws of the State of California;
" and all the property held by said complainant is as
" such agent, and so that suits may be brought and
" prosecuted in the United States courts; and said
" complainant does not transact any business or do
" any act or thing other than such as may be neces-
" sary to carry out the purposes of Miller & Lux, a
" corporation, organized under the laws of the State

" of California, except to hold title to property for " the purpose of prosecuting suits in the United States " courts." (See Answer, fol. 92; Cross-bill, fol. 142.)

The complainant filed a replication to the above portion of defendant's answer, denying said allegations of said answer (see Replication, fols. 175-177), and upon the issues thus raised testimony was taken before a special examiner, and filed in the office of the clerk of said Court. (See Enrollment, fol. 179; Report of Special Examiner, fols. 197-307.)

The Court filed its conclusions (fol. 184), and upon the evidence taken, as aforesaid, found the said allegation in defendant's answer to be true, and further found that the complainant holds the title to the lands described in the Bill of Complaint for the purpose of prosecuting and commencing this action in the Circuit Court of the United States, and that the said lands were conveyed to complainant for that purpose (fol. 182).

The decree of the Court dismissing complainant's bill is based upon these findings. (See Decree, fols. 181-182.)

THE EVIDENCE.

The evidence shows that Miller & Lux, a co-partnership, was the owner of the lands and riparian rights in question up to 1887, when Charles Lux, one of the two partners, died (fols. 198-199). Subsequent to the death of Mr. Lux the business was continued

in the name of Henry Miller, the surviving partner, until the heirs of Lux and said Henry Miller, in 1897, formed the corporation of Miller & Lux under the laws of the State of California, to which no outsiders were admitted as stockholders (fols. 199-200). The purpose of this corporation was to continue the business of the former copartnership during an extended period of liquidation, which the parties in interest deemed necessary to prevent loss and depreciation in the winding up of the business of said late copartnership and the final distribution of its former assets (fols. 251-256). It was authorized by its articles of incorporation to acquire all the property and assets of the late firm of Miller & Lux, to gradually dispose of the same, and to divide the proceeds among the stockholders, and, pending such disposition, to carry on the business of said late copartnership (fol. 266). By agreement between the heirs of Mr. Lux and Henry Miller, the surviving partner (fols. 260-261), the California corporation became the owner of all the said lands and riparian rights.

This corporation filed its complaint in the Superior Court of Merced County against this defendant, the appellee, in December, 1900, upon substantially the same cause of action, and for the identical relief, as that set forth and sought in this present suit (fols. 201, 212-213; and Exhibit 4 of defendant, being copy of the complaint filed in the State Court, fols. 288-303).

That action was pending at the time of the incorporation of the complainant, the Nevada corporation (fol. 200).

On June 12, 1905, the stockholders of the California corporation agreed in writing to form the Nevada corporation, the complainant herein (fol. 222). The articles of incorporation were signed and verified on the same day (fols. 234-235). These articles of incorporation enumerate the identical object and purpose, and confer the same powers (fols. 229-230) as are found in the articles of incorporation of the California corporation (fols. 266-267). And, indeed, the avowed purpose of the stockholders was to carry on the business of the California corporation with the assistance of the corporate entity of the Nevada branch (fols. 225-228). The reason for calling into existence the corporation, complainant herein, is frankly stated by the stockholders. It was to enable the corporation to carry on its litigation in the Federal courts, instead of in the State courts (fols. 223-224).

In pursuance of this design the Board of Directors of the California corporation on June 14, 1905, adopted a resolution to transfer and convey to this complainant all the property of Miller & Lux, a corporation, of California (fol. 247). The consideration for the transfer being the issuance to the California corporation of all but fourteen shares of the capital stock of the Nevada corporation (fol. 247),

the fourteen shares being subscribed by the incorporators.

The Nevada corporation having been organized, and having acquired title to the lands and riparian rights in question in this suit from the California corporation, between June 12 and June 14, 1905, filed its bill of complaint herein on the following day, June 15, 1905 (fol. 17).

On the same day the action pending in the State court since the year 1900 was dismissed (fols. 208, 304-305).

No steps have ever been taken to disincorporate the California corporation, and it exists at the present time, owning and holding all of the capital stock of the Nevada corporation, complainant herein (fols. 213-215, 205).

This stock, by agreement of the stockholders of the California corporation among themselves, is voted by them, as self-styled equitable owners thereof (fols. 226-227).

Thus there are two corporate entities, having the same amount of authorized capital stock, the same number of shares, the same objects, powers and purposes, the same persons as directors and officers, the same stockholders, and being identical in all respects, except that the legal title to the corporate property is in the Nevada corporation, while all the stock and the absolute control is in the California corporation (fols. 204-207).

ARGUMENT.

I.

The Circuit Court properly disregarded the superficial aspect of complainant as a separate and distinct corporation. In determining the jurisdictional question it had the right to look through the web of the artificial corporate entity and find the real parties in interest.

Oriental Investment Co. vs. *Barclay*, 25 Tex. Civ. App., 558; 64 S. W. R., 88;
Venner vs. *Great Northern etc. Co.*, 28 Supreme Court Rep., 328;
Lehigh Mining etc., Co. vs. *Kelly*, 160 U. S., 327.

In making its conveyance to the complainant, the California corporation was not dealing with an independent creature, exercising judgment or volition. On the contrary, the stockholders and officers were merely dealing with themselves, and for themselves, with reference to the *seat* of the legal title to the corporate property. Whatever force there might otherwise be in the argument of counsel for appellant, that the motive for the transfer is immaterial, that force is wholly lost by reason of the fact that the California corporation owns all the stock and is in absolute control. There can be no corporation without stockholders. The stockholders are the substance;

the corporate entity is merely the fiction of the law. The real parties in interest, in any event, are the stockholders, who furnish the capital and share the losses and profits.

II.

The interests of the California corporation in the Nevada corporation, this complainant, are exclusive and supreme. The two corporations are identical in every material incident.

The complainant has no stockholders separate and apart from the California corporation. It has no powers except those peculiar to the California corporation, and which may be said to be *sui generis*. It has no business distinct from that of the California corporation. It has no capital, for there was no capital subscribed or paid in. Its stock was issued for the legal title to the property which was conveyed to it by its prototype. Every share of it was issued for the conveyance. The transaction was not a sale, but a transfer for a special purpose; the powers of both corporations being restricted to the liquidation and distribution of the business and assets of the old partnership, and all their incidental powers being expressly made subservient and subsidiary to the main purpose by the terms of the articles of incorporation of each corporation. There was not an element of a real transaction, outside of a pretended change of

residence, in the transfer of all this property. The transferree itself was given a limited existence, in that it was to be the substitute or successor of the California corporation upon its dissolution, possessing no authority to transact any business other than that of the California corporation. Its stock had no intrinsic value disconnected from the control residing in the California corporation. There can not be two distinct stock issues, except in the sense that the one represents the control, and the other the thing controlled, unless there are two distinct enterprises, two sets of stockholders, two separate investments of capital, and two sets of tangible assets. If the stockholders of the California corporation were to decide to-morrow to have the property reconveyed to that corporation, the Nevada corporation would have nothing left except the paper on which its stock certificates are printed. The *same stockholders* can not transact business on *one capital* under the *guise of two corporations* organized in *different States*, without exposing themselves to a challenge of their right to invoke the jurisdiction of the Federal courts. A corporation, like an individual, can be a citizen of but one State. The formation of a corporation in a foreign State, by a corporation domiciled here, under the circumstances of this case, at most is but a step in the removal of the corporate residence. Until the corporate entity is destroyed and the franchise surrendered, the removal is incomplete. The corpora-

tion of Miller & Lux is still in this State, and transacting business, and holding property, as a domestic corporation. It still exercises the rights and privileges of a corporation under the laws of the State of California. It is not shorn of all property and business, as claimed by counsel for appellant. It is not shorn of any property; for it owns all of the stock of the Nevada corporation; and its business continues uninterrupted, even though it employs an agent to whom it occupies the relation of sole stockholder and principal.

There appears, upon consideration of the whole transaction, such a beneficial and exclusive interest of the California corporation in the subject matter of this suit, as to make it appear beyond a doubt that the suit is not really and substantially between citizens of different States.

Lehigh Mining etc. Co. vs. *Kelly*, 160 U. S., 327-340;
Waite vs. *Santa Cruz*, 184 U. S., 325.

Counsel for appellant lays stress upon the fact that the voting power of the Nevada stock is in the California stockholders. This is so by agreement between themselves. Otherwise, the California corporation is the owner of the stock. We fail to see how that fact can have any bearing upon the question of the status of the Nevada corporation in this suit. It is merely splitting another hair. If the

California corporation could not legally dissolve itself, from whatever cause, by dividing the Nevada stock directly among its stockholders, then any arrangement of the stockholders as to the voting power of the stock must, of necessity, fall short of bringing about even a partial dissolution. It does not eliminate the corporation to any extent as claimed by appellant; for whether the stock is voted by a majority of the board of directors, or by the stockholders, the corporation is very much in evidence in supplying the stockholders and directors alike, neither of which could exist if there were no corporation.

Counsel for appellant seems to miss the connection. The dissolution or non-dissolution of the California corporation may not add to, or detract from, the validity or effect of the conveyance. But until the corporation surrenders its franchise here it can not cease to be a citizen and resident of this State, even though it may convey its property to another corporation. It is by reason of the relation existing between the two corporations, by reason of the identity of the two corporations in every material incident, in substance, if not in fiction, that the law denies the right to federal jurisdiction. Neither is it a question of resulting trust or no resulting trust. It is the case, rather, of one identity and a dual existence. The effect of the decision of the Circuit Court is not to render the complainant a perpetual outlaw from the federal courts, as feared by appellant, but

merely to relegate it to the State courts in its litigations with citizens of this State, while its principal and master, *and the real party in interest,* remains a resident and citizen of this State.

Under this view of the law, it seems, no answer is required to the criticism of appellant on the decision in the case of *Lehigh Mining, etc., Co.* vs. *Kelly, supra,* or to the limited construction placed by him upon the ruling of the Court in that case. Admitting, for the sake of argument, that the circumstances of this case show an attempt in good faith on the part of the stockholders of Miller & Lux to change the residence of the corporation, and that the Nevada corporation is to be its *bona fide* successor, the whole brief of appellant is an admission that this removal has not yet taken place, because from one cause or another Miller & Lux have been compelled to remain, and are still doing business, in this State as a corporation created and domiciled therein. It is still the owner of all the capital stock of the Nevada corporation and in absolute control thereof. It is still the real party in interest. The Nevada company can not become its successor until its dissolution. The complainant can have no separate business and no separate purpose, and while its predecessor wields control it must of need content itself with the character and authority of an agent.

Thus, even though there had never been present any intent to have the property reconveyed to the

California corporation, the stockholders of *that* corporation are still directly engaged in the business of winding up the affairs of the old partnership *through the California corporation,* whose capital stock they own. They own no stock in the Nevada corporation, and can not own that stock until their own corporation is dissolved. Therefore, the most that can be said is that they have consented to the transfer of the property for the uses and purposes of the California corporation, and subject to its control. But ultimately the California stockholders have it in their absolute power to arbitrarily take away the legal title from the Nevada corporation at any time and without paying any consideration therefor, and to put it back into the California corporation. This power is deemed the equivalent of such a beneficial interest in the property, as to render the dispute or controversy involved in the suit really and substantially one between citizens of the same State.

Lehigh Mining Co. vs. *Kelly, supra.*

III.

The pretended change of corporate residence was made for the purpose of creating a case for federal jurisdiction, and the lands and water rights in dispute were conveyed to the Nevada corporation for that purpose. The Circuit Court was justified by the evidence in finding that fact.

(1) The stockholders' agreement of June 12, 1905, for the formation of the Nevada corporation frankly avows that purpose.

(2) The formation of the Nevada corporation, the dismissal of the action pending in the State Court, and the commencement of this suit in the name of complainant, are all acts so closely connected in point of time, as to make them all part of one purpose and one transaction.

(3) The sole purpose of the pretended change of residence was to create the right to sue in the federal courts; the other reasons given are mere sham and pretense; and the change of residence is not made in good faith and was never consummated.

The recitals in the stockholders' agreement of June 12, 1905, to the effect that the corporate litigations are more conveniently carried on in the federal courts, and that therefore it is desirable to incorporate under the laws of the State of Nevada, so as to open the doors of the federal courts to them, the

same as to other foreign corporations, are competent evidence and are binding upon the complainant. They constitute declarations made by a party against his own interest, because made by those who are the officers and stockholders of complainant and of the California corporation, and in the absolute control of both corporations.

But it is claimed by appellant that there are other recitals, also in evidence, and favorable to it. Let us take up these recitals in their order.

It is recited, in the first place, that the laws of Nevada are more favorable than those of California, in that they give immunity from stockholders' liability for the corporate debts and from corporate assessments. Granting the premises, they could hardly have influenced the stockholders of a corporation formed for the mere purpose of selling off immense properties and dividing the proceeds among themselves. Next, it is claimed that there is in California a tax upon corporate franchises in addition to the tax upon the property of corporations. If the properties of Miller & Lux could be removed from the State, and if the franchise of a foreign corporation, doing business and owning property in the State, could not be assessed in connection with the property it owns and employs in the State in the conduct of its business, the escape from the burdens of taxation might be advanced as a valid reason for changing the corporate residence, although we are

not informed that the same system of taxation does not prevail in the State of Nevada. But, unfortunately for appellant's contention, the State of California does not discriminate in its system of taxation in favor of foreign corporations (Sec. 15, Article XII, *Constitution of California; New York, etc.* vs. *Roberts,* 171 U. S., 658; *Adams Express Co.* vs. *Kentucky,* 166 U. S., 171; the method of arriving at the valuation being left to the determination of the Assessor, *Bank of California* vs. *San Francisco,* 142 Cal., 276). And, finally, it is said, the laws of the State of California are in many particulars uncertain and unsettled, particularly as to dividends. All these objections must have been considered by the incorporators at the time of the incorporation of the California company, when Mr. Miller objected to incorporating under the laws of any other State than California (fol. 211). And when the question of dividends was finally submitted to the Supreme Court of California, that Court found the law sufficiently certain to encounter no difficulty in deciding in favor of the California corporation (*Baldwin* vs. *Miller & Lux,* 92 Pac. R., 1030).

Thus analyzed, those other recitals, for whose benefit appellant so strenuously contends, appear of so flimsy material that they may properly be characterized as mere colorable declarations made to cover up the naked attempt to circumvent the law. Or, in the language of the opinion of the Circuit

Court (fol. 188), they can be looked upon only as self-serving declarations, carrying but little or no weight.

Hence there can be little, if any. doubt remaining that the removal was not with a *bona fide* intention of changing the corporate domicile.

Butler vs. *Farnsworth,* 4 Wash. C. C., 101, 103;
Morris vs. *Gilmer,* 129 U. S., 328, 329;
Lehigh Mining, etc., Co. vs. *Kelly,* 160 U. S., 327-340.

In the absence of any and all evidence to the contrary, what other inference can reasonably be drawn from the acts of the California corporation, i.e., the formation of complainant corporation, the dismissal of the action pending in the State Court, and the commencement of this suit in the Circuit Court, all occurring within 48 hours, than that the whole transaction was merely a device to gain admission to federal jurisdiction? And, after all, Miller & Lux is still a corporation and doing business in the State of California as a corporation organized and domiciled therein. Henry Miller's refusal to incorporate in any other State than California may explain the reason why no steps have ever been taken to consummate the pretended removal of the corporate domicil, and the avowed desire to gain admission to

the federal courts in connection therewith shows clearly that no actual removal was ever intended.

In the face of all this proof, the mere fact that the formation of the Nevada corporation was talked about as early as 1897 can not possibly suffice to establish the good faith of the transaction of 1905. Neither can the question of expense have any such effect. The advantages of access to the federal courts, especially if such access were gained without dissolving the corporation in California, would easily outweigh any considerations of expense in the sum of a few thousand dollars, which, in view of the wealth of Miller & Lux and its vast amount of litigation is a mere trifle.

Appellant further contends, to show the *bona fides* of the pretended change of the corporate residence, that "one of the avowed objects of the transfer, (federal jurisdiction) could not be accomplished by a temporary transfer." The learned counsel for appellant is not content with attacking the decision of the Circuit Court, but he also placidly "steals its thunder." Humor and levity do not find proper place in a brief presented to this Court, but the humorous suggestion of counsel warrants this comment. The alacrity with which he appropriates to his own use the very rule upon which the Circuit Court found against appellant, is only exceeded by the almost child-like naivety of his manifest ingenuity. The picture is presented of the law-breaker

pleading his own lawless act in defense of punishment, since he could not have meditated crime because the law will not sanction its commission.

IV.

So far as federal jurisdiction is concerned, and for jurisdictional purposes in a case like this, the citizenship of the California corporation of Miller & Lux determines the question of federal jurisdiction in this case.

Appellant, in subdivision V of his brief, cites a number of cases to support his contention that the two corporations will be considered distinct so far as federal jurisdiction is concerned.

This subject or branch of the law is really rather unsettled, and we think that in view of the express finding of the Circuit Court, "that the complainant "holds the title to the lands described in the bill "of complaint for the purpose of prosecuting and "commencing this action in the Circuit Court of the "United States, and that said lands were conveyed "to complainant for that purpose, and that the com- "plainant has been collusively made a party plain- "tiff to this suit for the purpose of creating a case "cognizable by the Circuit Court," the consideration of that question is not involved in the decision of this case. But since the question has been brought into

this case by appellant, we feel it our duty to briefly meet appellant's contention with regard to it.

Every case cited by appellant is the case of a consolidation of interstate corporations into one corporation transacting an interstate business throughout several States. The case at bar is therefore distinguishable from all those cases upon the ground that the business of Miller & Lux is in no sense an interstate business.

But since the principle of law applied in the decisions of those cases is substantially underlying the rule for which we here contend, we shall discuss the cases cited by appellant under this subdivision of the case, and show that they are in fact authorities in support of the contentions herein advanced in behalf of the appellee.

Appellant cites in one breath such cases as *Louisville, etc., Co.* vs. *Louisville Trust Co.*, 174 U. S., 552, and *Goodwin* vs. *N. Y., etc., Co.*, 124 Fed. R., 358. Each of these cases represents a distinct class of cases and decisions, which differs one from the other in the elementary facts which distinguish the two classes. The courts have been compelled by reason of this fundamental distinction to discriminate between the two classes of cases, and to divide the corporations in question into class one, such as in the case of *Goodwin* vs. *N. Y., etc., Co., supra,* and class two, such as in the Louisville case.

Class one takes in corporations which are severally

formed by natural persons in several States, and which thereupon consolidate by action of the stockholders of each component corporation, or where concurrent legislative enactments of two or more States confer upon the stockholders of two or more corporations domiciled in such States, respectively, the quality of being stockholders in either and each of such corporations, and unite the several corporations into one corporation, subject to the approval of the stockholders of each. Such was the case of *Goodwin* vs. *New York, etc., R. R. Co., supra.*

Class two takes in corporations which take a creative charter in one State, and ancillary or permissive charters in others; as where a corporation of one State is made a corporation of an adjoining State by legislative act of such adjoining State, or where the corporation of one State files a certified copy of its articles of incorporation in another State, and is thereby created a corporation of such State by virtue of its statutes. These permissive or ancillary corporations thus created in the foreign State are said to be corporations not formed by natural persons. This class of cases is represented by the *Louisville* case, *supra.*

In other words, the one class includes consolidated corporations, separately created; and the other class comprises corporations, the existence or activity of which is continued or extended into foreign territory,

whence the ancillary corporation is regarded as a continuity of the same corporation.

If it were necessary to a determination of this case to decide to which class the corporation of Miller & Lux of Nevada really belongs, we should contend that in view of the peculiar object, and the so to say *sui generis* character of the business, for which both the California and the Nevada corporation was formed, and in view of the further fact that the California corporation furnished all the capital and holds all the stock of the Nevada corporation, the latter corporation is merely ancillary to the former, and that the two corporations are in substance but one corporation, existing in two States, which under the decisions of this Court must be held a class two corporation.

In such case, it being undisputed that the corporation was first formed in the State of California, even if it was afterwards created a corporation of the State of Nevada also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of the State of California, the State by which it was originally created.

Louisville, etc., Co. vs. *Louisville Trust Co.*, 174 U. S., 552, 563;
St. Louis R. Co. vs. *James*, 161 U. S., 545, 559.

If, on the other hand, it were held that the two

corporations were distinct corporations, belonging to the first class, then there are several reasons discussed in *Goodwin* vs. *N. Y., etc., Co.*, 124 Fed. R., 370-371, why the theory or fiction of this first class of corporations must be developed so as to permit the older of the several corporations to stand for and represent them all, and to deem its citizenship as fixing the citizenship of all for the purposes of federal jurisdiction. That was the construction put upon the decision of this Court in the case of *Nashua, etc., Co.* vs. *R. R. Corporation*, 136 U. S., 356, 373, by Judge Lowell, in a careful review of that decision found on pages 362-366 of the opinion in *Goodwin* vs. *N. Y., etc., Co., supra.*

See also:

Smith vs. *N. Y. etc. Co.*, 96 Fed. R., 507.

At any rate, we take it that a fair reading of the able opinion of Judge Lowell, and the logical import of his decision, in the Goodwin case is to the effect that Miller & Lux can not sue in the Circuit Court in California a citizen of California, by alleging that it is a corporation of the State of Nevada.

Furthermore, because the Nevada corporation may have, and undoubtedly has, a separate existence in the State of Nevada for many purposes, it does not follow that it has such existence as a foreign corporation for purposes of Federal jurisdiction in the State

of California. If it be treated as the future successor of Miller & Lux of California, upon its dissolution, which is all that is claimed for it by appellant, then it is clearly an ancillary entity only before such dissolution, and while the California corporation continues to exist, in aid of the pretended removal of the corporate domicil, which may never be consummated. The transfer of the property and the several steps in the process of the removal of the corporate residence, including the final dissolution of the California corporation, must then be deemed as one transaction, which is not complete until the final act of dissolution. Until then, while the conveyance passed the legal title and estate, the beneficial use remains in the California corporation, whose stockholders are at liberty and have the present power to arrest the process of removal and restore the legal title to the latter corporation.

In conclusion we shall quote from the opinion of the Circuit Court in New Hampshire in the case of *Goodwin* vs. *Boston & M. R. R.*, as follows:

> "It should be noticed that the older and general doctrine of a convenient rule of fiction, which, for jurisdictional purposes, treats a railroad system operating continuous lines through several States, under charters independently granted under the same name in the different States, as a citizen of the several States in which it operates, has apparently been questioned or qualified, in a

sense, by more recent cases, like *Railroad* vs. *Koontz,* 104 U. S., 5; *St. Louis etc. R. R.* vs. *James,* 161 U. S., 545, and *Southern R. Co.* vs. *Allison,* 190 U. S., 326. It is not necessary, however, to inquire in this case just how far such qualification results from the modern practice of taking a creative charter in one State, and ancillary and permissive charters in others, for the reason that the unmistakable trend of the authorities involving such situations is in the direction of treating citizenship for certain purposes as existing in the State of corporate creation, or, in other words, in the State where the corporation was first chartered."

Goodwin vs. *Boston & M. R. R.,* 127 Fed. R., 986, 989.

We respectfully submit that the evidence taken and considered by the Circuit Court amply sustains the express findings of that Court, and also that upon all the other facts disclosed by the record the conclusions of the lower court must be sustained, and that therefore the decree should be affirmed.

JAMES F. PECK,
Solicitor for Appellee.

F. D. McKENNEY,
Of Counsel.

MILLER & LUX, INCORPORATED, *v.* EAST SIDE CANAL & IRRIGATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 518. Submitted October 13, 1908.—Decided December 7, 1908.

While jurisdiction of the Circuit Court exists even if complainant's motive in acquiring citizenship was to invoke that jurisdiction, the citizenship must be real and actually acquired with the purpose of establishing a permanent domicil. *Morris* v. *Gilmer*, 129 U. S. 315.

Where the complainant corporation was organized for the sole purpose of invoking the jurisdiction of the Circuit Court, and any decree in its favor would be really under the control, and for the benefit, of another corporation of the same State as defendant, the suit should be dismissed as one in which the complainant was collusively

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instituted before the proper tribunal to have the franchise granted by this chapter and all rights and privileges granted hereunder, forfeited and declared null and void."

so organized for the purpose of creating a case cognizable in the Circuit Court within the meaning of § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, 472. *Lehigh Mining & Manufacturing Co.* v. *Kelly*, 160 U. S. 327.

THE facts are stated in the opinion.

Mr. Edward F. Treadwell for appellant:

The mere fact (if it be a fact) that complainant was formed and this property transferred to it for the purpose of conferring jurisdiction upon the Federal courts, can in no way affect the jurisdiction of those courts. *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 191; *McDonald* v. *Smalley*, 1 Pet. 620; *Smith* v. *Kernochen*, 7 How. 198, 216; *Barney* v. *Baltimore*, 6 Wall. 280; *Morris* v. *Gilmer*, 129 U. S. 315, 328; *Cross* v. *Allen*, 141 U. S. 528, 533; *Crawford* v. *Neal*, 144 U. S. 585; *Lake County Commissioners* v. *Dudley*, 173 U. S. 243, 254; *South Dakota* v. *North Carolina*, 192 U. S. 286, 310; *Blair* v. *Chicago*, 201 U. S. 400, 448; *Briggs* v. *French*, Fed. Cas. No. 1,871; *Case* v. *Clarke*, Fed. Cas. No. 2,490; *Van Dolsen* v. *New York*, 17 Fed. Rep. 817; *Neal* v. *Foster*, 36 Fed. Rep. 29, 41; *Ashley* v. *Supervisors*, 83 Fed. Rep. 534, 537; *Woodside* v. *Ciceroni*, 93 Fed. Rep. 1; *Collins* v. *Ashland*, 112 Fed. Rep. 175, 178; *Adams* v. *Shirk*, 117 Fed. Rep. 801, 805; *Cole* v. *Ry. Co.*, 140 Fed. Rep. 944, 946.

The transfer to the Nevada corporation was upon a valuable consideration, and consequently no trust resulted in favor of the California corporation. 15 Am. & Eng. Ency. of Law, 2d ed., p. 1125; *St. John* v. *Benedict*, 6 John Ch. N. Y. 111; Civil Code of Cal., § 1614.

The dissolution or non-dissolution of the California corporation is entirely immaterial.

The recital in the agreement that the stock of the Nevada corporation could not be distributed to the stockholders of the California corporation prior to dissolution correctly states the law. *Kohl* v. *Lilienthal*, 81 California, 378.

The provision, also, that the voting power of the stock should

be separated from the legal title and vested in the stockholders of the California corporation is entirely valid under the law of the State of California. *Smith* v. *S. F. & N. P. Ry. Co.*, 115 California, 584.

It follows from this that the California corporation was as effectually eliminated as if it had been absolutely dissolved. The transfer to the Nevada corporation was an absolute one, without any understanding, express or implied, that the property should ever be reconveyed, and the case of *Lehigh Min. & Mfg. Co.* v. *Kelly*, 160 U. S. 327, has no application to such a transfer.

It matters not how closely related two corporations may be, nor what similarity there may be in names, incorporators, stockholders, officers and purposes, they will be considered distinct so far as Federal jurisdiction is concerned. *Louisville Co.* v. *Louisville*, 174 U. S. 552, 563; *St. Louis* v. *James*, 161 U. S. 545, 559; *Lehigh M. & M. Co.* v. *Kelly*, 160 U. S. 327, 347; *Nashua & L. R. Corp.* v. *R. Corp.*, 136 U. S. 356, 373; *Muller* v. *Dows*, 94 U. S. 444; *Goodwin* v. *New York &c. Co.*, 124 Fed. Rep. 358, 364; *Missouri Pac. Ry.* v. *Meeh*, 69 Fed. Rep. 753, 755; *Farnham* v. *Canal Corp.*, 1 Sumn. 46, 62; *S. C.*, Fed. Cas. No. 4,675; *Racine Co.* v. *Farmers Co.*, 49 Illinois, 331.

Mr. James F. Peck and *Mr. Frederic D. McKenney*, for appellee:

The Circuit Court properly disregarded the superficial aspect of complainant as a separate and distinct corporation. In determining the jurisdictional question it had the right to look through the web of the artificial corporate entity and find the real parties in interest. *Oriental Investment Co.* v. *Barclay*, 25 Tex. Civ. App. 558; *Venner* v. *Great Northern Co.*, 209 U. S. 24; *Lehigh Mining &c. Co.* v. *Kelly*, 160 U. S. 327.

The interests of the California corporation in the Nevada corporation, this complainant, are exclusive and supreme. The two corporations are so identical in every material incident that the suit is not really and substantially between

citizens of different States. *Lehigh Mining &c. Co.* v. *Kelly*, 160 U. S. 327, 340; *Waite* v. *Santa Cruz*, 184 U. S. 325.

The pretended change of corporate residence was made for the purpose of creating a case for Federal jurisdiction, and the lands and water rights in dispute were conveyed to the Nevada corporation for that purpose. The Circuit Court was justified by the evidence in finding that fact.

There can be little, if any, doubt that the removal was not with a *bona fide* intention of changing the corporate domicil. *Butler* v. *Farnsworth*, 4 Wash. C. C. 101, 103; *Morris* v. *Gilmer*, 129 U. S. 328, 329; *Lehigh Mining &c. Co.* v. *Kelly*, 160 U. S. 327–340.

So far as Federal jurisdiction is concerned, and for jurisdictional purposes in a case like this, the citizenship of the California corporation of Miller & Lux determines the question of Federal jurisdiction in this case. *Goodwin* v. *Boston & M. R. R.*, 127 Fed. Rep. 986, 989.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought in the Circuit Court of the United States for the Southern District of California by "Miller & Lux, Incorporated," a corporation of Nevada, against the East Side Canal & Irrigation Company, a corporation of California.

The case is here upon a certificate under the act of Congress of March 3, 1891, c. 517, 26 Stat. 826, relating to the jurisdiction of the Circuit Court as affected by § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, 472. That section provides that if, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear at any time to the satisfaction of said Circuit Court that such suit "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants,

for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just; but the order of said Circuit Court dismissing or remanding said cause to the state court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

In stating the object and scope of that act this court in *Williams* v. *Nottawa*, 104 U. S. 209, 211, referred to the act of 1875 and said: "In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction; for as was very properly said by Mr. Justice Miller, speaking for the court, in *Barney* v. *Baltimore*, 6 Wall. 280, 288, such transfers for such purposes are frauds upon the court, and nothing more."

In the answer of the defendant it is alleged that Miller & Lux, Incorporated, was organized as a corporation in Nevada, but to act only as an agent of "Miller & Lux," a corporation of California; that the California corporation was the owner of all the capital stock of Miller & Lux, Incorporated, which as a corporation had no existence except as a mere agency of Miller & Lux, the California corporation; that all the property held by the plaintiff was as such agent in order that suits could be brought and prosecuted in the United States courts; and that the plaintiff does not transact any business or do any act or thing other than such as may be necessary to carry out the purposes of the California corporation, "except to hold title to property for the purpose of prosecuting suits in the United States courts."

To these allegations the plaintiff made special replication,

evidence was taken as to their truth and the cause was submitted upon the issue thus made. The court found the allegation in the answer to be true; that the complainant held the title to the lands described in the bill for the purpose only of prosecuting and commencing this action in the Circuit Court of the United States, and that the lands were conveyed to plaintiff for that purpose; and it appearing to the satisfaction of the court that the Nevada corporation had been collusively made a party plaintiff for the purpose of creating a case cognizable by the Circuit Court of the United States, and that the suit did not really and substantially involve a dispute or controversy within the jurisdiction of that court, the bill was dismissed.

It was established by the evidence and the court found as follows:

Henry Miller and Charles Lux were partners prior to and up to the death of Lux, one of the parties, which occurred March 15, 1887.

In April, 1897, the heirs of the deceased partner and Miller, the surviving partner, wishing to have the partnership business liquidated and its assets distributed among those entitled thereto, made an agreement to form a corporation under the laws of California and transfer to it all the property of the partnership, each person to receive in lieu thereof capital stock proportioned to his interest in the partnership. Pursuant to that agreement the corporation of "Miller & Lux" was organized in California on the fifth day of May, 1897; to it was conveyed the property of the partnership and the stock of the corporation was distributed as provided in the agreement.

On the seventeenth day of December, 1900, the California corporation of Miller & Lux commenced an action in the Superior Court of Merced County, California, against the present defendant the East Side Canal & Irrigation Company, a California corporation. The object of that suit was to have the latter corporation perpetually enjoined from obstructing the natural flow of the waters of San Joaquin River and its branches, along and

bordering on which the California corporation of Miller & Lux claimed certain lands, as well as from interfering with the waters of that river, above those lands and to their injury.

On the twelfth day of June, 1905—the above suit in the state court still being on the docket—the California corporation and the stockholders owning more than two-thirds of its capital stock, entered into an agreement that they would at once form a corporation under the laws of Nevada with an authorized capital of $12,000,000—all of such capital stock to be issued and be deemed fully paid up—each director of the California corporation of Miller & Lux to be an incorporator of the Nevada corporation and to subscribe two shares of such capital stock to be issued as fully paid up stock of the new corporation.

That agreement stated that the laws of California were unsatisfactory and in many particulars uncertain and unsettled, "particularly as to dividends, a matter of the most vital importance to us, and as to which litigation is now pending and undetermined." These difficulties, it was said, did not exist to the same extent under the laws of Nevada. Among the reasons assigned in the agreement for the formation of the Nevada corporation was the belief, on the part of the stockholders of the California corporation, that their rights in litigated cases would be "most fully protected and conserved in the Federal courts, to which corporations formed in other States are entitled to resort."

The above agreement provided that upon the formation of the Nevada corporation all the property, real and personal, of the California corporation should be transferred and conveyed to the Nevada corporation, and that the capital stock of the latter corporation should be issued as fully paid up stock to the California corporation; and that after such transfer and conveyance were completed, and as soon as the law would permit, the California corporation should be dissolved by voluntary proceedings under the State Code of Civil Procedure of that State.

On the same day, June 12, 1905, the parties to that agree-

ment signed and acknowledged articles of incorporation for the proposed Nevada corporation of "Miller & Lux, Incorporated." All the capital stock of that corporation was issued to the California corporation. The directors of the California corporation became and are also the directors of the Nevada corporation. Each company had the same President, Vice-President, Secretary and Treasurer, and offices at the same place. "Said corporation," it was found, "are the same in name purposes, capitalization, directors, officers, office and place of business."

On the fifteenth day of June, 1905, the California corporation of Miller & Lux directed the dismissal of the suit brought in the state court. And on the same day the present suit was brought in the Circuit Court of the United States in the name of the Nevada corporation against the East Side Canal & Irrigation Company. The relief sought was substantially the same as that sought in the suit instituted in the state court.

Process in the suit brought in the Circuit Court by the Nevada corporation was served on June 17, 1905, and *on the same day* the California corporation formally dismissed its suit in the state court.

The California corporation had not been dissolved nor had it ceased to exist when the present suit was brought by the Nevada corporation. It was then in existence, with all of its powers unmodified. And it does not appear that any steps had or have been taken to disincorporate the California corporation. Nor can it be said when, if ever, that corporation will be dissolved.

We are of opinion that the court below did not err in dismissing the suit. The question raised by the record is substantially the same as that determined in *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327. That was an action involving the title to certain lands in Virginia in the possession of citizens of that Commonwealth, and of which lands a Virginia corporation claimed to be the owner. The individual stockholders and officers of the Virginia corporation organized a

corporation in Pennsylvania, to which the former corporation conveyed all its rights, title and interest in the Virginia lands, without any valuable consideration. The stockholders in both corporations were identical. The admitted purpose of organizing the Pennsylvania corporation and conveying to it the lands there in question was to give the Circuit Court of the United States, sitting in Virginia, jurisdiction to determine the disputed controversy as to the lands. All this having been done, the Pennsylvania corporation instituted a suit in the Federal court in Virginia against the individual citizens of Virginia to recover the lands. When that suit was instituted the Virginia corporation still existed with the same stockholders it had at the time of the conveyance by it to the Pennsylvania corporation.

This court said (p. 331) that "The Virginia corporation still exists with the same stockholders it had when the conveyance of March 1, 1893, was made; and that, as soon as this litigation is concluded, the Pennsylvania corporation, if it succeeds in obtaining judgment against the defendants, *can be required by the stockholders of the Virginia corporation*, being also its own stockholders, to reconvey the lands in controversy to the Virginia corporation without any consideration passing to the Pennsylvania corporation."

After referring to several cases, this court, among other things, also said (p. 336): "In harmony with the principles announced in former cases, we hold that the Circuit Court properly dismissed this action. The conveyance to the Pennsylvania corporation was without any valuable consideration. It was a conveyance by one corporation to another corporation—the grantor representing certain stockholders, entitled collectively or as one body to do business under the name of the Virginia Coal and Iron Company, while the grantee represented *the same stockholders*, entitled collectively or as one body to do business under the name of the Lehigh Mining and Manufacturing Company. It is true that the technical legal title to the lands in controversy is, for the time, in the Penn-

sylvania corporation. It is also true that there was no formal agreement upon the part of that corporation 'as an artificial being, invisible, intangible, and existing only in contemplation of law,' that the title should ever be reconveyed to the Virginia corporation. But when the inquiry involves the jurisdiction of a Federal court—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record, *Grace* v. *American Central Insurance Co.*, 109 U. S. 278, 283; *Bors* v. *Preston*, 111 U. S. 252, 255—we cannot shut our eyes to the fact that there exists what should be deemed an equivalent to such an agreement, namely, the right *and power* of those who are stockholders of each corporation to *compel* the one holding the legal title to convey, *without a valuable consideration*, such title to the other corporation. In other words, although the Virginia corporation, as such, holds no stock in the Pennsylvania corporation, the latter corporation holds the legal title, subject *at any time* to be divested of it by the action of the stockholders of the grantor corporation who are also its stockholders. The stockholders of the Virginia corporation—the original promoters of the present scheme, and, presumably, when a question of the jurisdiction of a court of the United States is involved, citizens of Virginia—in order to procure a determination of the controversy between that corporation and the defendant citizens of Virginia, in respect of the lands in that Commonwealth, which are here in dispute, assumed, as a body, the mask of a Pennsylvania corporation, for the purpose, and the purpose only, of invoking the jurisdiction of the Circuit Court of the United States, retaining the power, in their discretion, and after all danger of defeating the jurisdiction of the Federal court shall have passed, to throw off that mask and reappear under the original form of a Virginia corporation—their right, in the meantime, to participate in the management of the general affairs of the latter corporation not having been impaired by the conveyance to the Pennsylvania corporation. And all this may be done, if the position of the plaintiffs be

correct, without any consideration passing between the two corporations." Observing that the Pennsylvania corporation received the technical legal title for the purpose only of bringing a suit in the Federal court, the court proceeded (p. 342): "As we have said, that corporation may be *required* by those who are stockholders of its grantor, and who are also its own stockholders, at any time, and *without receiving therefor any consideration whatever*, to place the title where it was when the plan was formed to wrest the judicial determination of the present controversy from the courts of the State in which the land lies. It should be regarded as a case of an improper and collusive making of parties for the purpose of creating a case cognizable in the Circuit Court. If this action were not declared collusive, within the meaning of the act of 1875, then the provision making it the duty of the Circuit Court to dismiss a suit, ascertained at any time to be one in which parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable by that court, would become of no practical value, and the dockets of the Circuit Courts of the United States will be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance."

The present case is controlled by the one just cited. The two cases are alike in all material respects. Looking at the facts as they were when this suit was instituted in the Circuit Court, it must be taken that the transfer of the property of the California corporation to the Nevada corporation was merely formal—only a device by which to have the rights asserted by the California corporation in the state court determined by the Federal court rather than by the state court. The agreement that all the property of the California corporation should be transferred to the Nevada corporation was attended by the condition that all the capital stock of the new corporation should be issued—and it was issued—to the California corporation which remained in existence with full power as the owner of such stock to control the operations of the

Nevada corporation. If before the institution of this suit the California corporation had distributed among those entitled to it the stock of the Nevada corporation, issued to it as fully paid up stock, and had then ceased to exist or been dissolved, a different question might have been presented. But such is not this case. As the facts were, when this suit was brought the California corporation could at any time, even after this suit was concluded, have required the Nevada corporation, without any new or valuable consideration, to surrender all its interest in the property which it had obtained from the California corporation for the purpose of acquiring a standing in the Circuit Court of the United States. In other words, the Nevada corporation had no real interest in the property. Its ownership was a sham, in that it could at any time after the bringing of this suit have been compelled by the California corporation to dismiss the suit and abandon all claim to the property in question. It took the title only as matter of form, in order that the California corporation, or the stockholders interested in it, might, under the name of the Nevada corporation, invoke the jurisdiction of the Federal court and avoid the determination of the rights of the parties in the courts of the State. *Barney* v. *Baltimore City*, 6 Wall. 280, 288. The prosecution of the suit was really for the benefit of those who were interested in the California corporation.

We do not intend by what has been said to qualify the general rule, long established, that the jurisdiction of a Circuit Court, when based on diverse citizenship, cannot be questioned upon the ground *merely* that a party's motive in acquiring citizenship in the State in which he sues was to invoke the jurisdiction of a Federal court. But that rule is attended by the condition that the acquisition of such citizenship is real, with the purpose to establish a permanent domicil in the State of which he professes to be a citizen at the time of suit, and not fictitious or pretended. *Morris* v. *Gilmer*, 129 U. S. 315, 328. In that case the question was whether the plaintiff who was residing with his adversary in Alabama actually acquired such

a domicil in Tennessee as entitled him to bring suit in the Federal court, sitting in Alabama. This court said: "Upon the evidence in this record, we cannot resist the conviction that the plaintiff had no purpose to acquire a domicil or settled home in Tennessee, and that his sole object in removing to that State was to place himself in a situation to invoke the jurisdiction of the Circuit Court of the United States. He went to Tennessee without any present intention to remain there permanently or for an indefinite time, but with a present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the Federal court to determine his new suit. He was, therefore, a mere sojourner in the former State when this suit was brought. He returned to Alabama almost immediately after giving his deposition. The case comes within the principle announced in *Butler* v. *Farnsworth*, 4 Wash. C. C. 101, 103, where Mr. Justice Washington said: 'If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the Federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicil, however frequent and public his declarations to the contrary may have been.' "

In the present case, although the Nevada corporation appeared, upon the face of the record, to be the owner of the rights which the California corporation had asserted in the state court, it was, when this suit was brought, only the representative of the California corporation and its stockholders. The latter corporation holding all the stock and having the same directors and officers as the Nevada corporation, could control the suit brought by the Nevada corporation, and, in the event of a favorable decree, could have compelled it to surrender or abandon all its claims to the California corporation, which was still in existence when this suit was brought.

As the Nevada corporation was formed by the direction of the California corporation, its stockholders and officers, for

the purpose only of having the matters in dispute between the California corporation and the East Side Canal & Irrigation Company determined in the Federal court rather than in the state court where they were pending and undetermined; as the Nevada corporation assumed to be the owner of the property rights which the California corporation had asserted against the Canal & Irrigation Company only that it might have a standing in the Federal court as a litigant in respect of those rights; and as the California corporation could have controlled the conduct of the suit brought by the Nevada corporation at any time after it was brought, and up to the date of the decree below, and could have required the Nevada corporation, in the event of a decree in its favor, to transfer the benefit of such decree to the California corporation, without any new or valuable consideration, we hold that the suit was properly dismissed under the fifth section of the act of 1875 as one in which the Nevada corporation was organized and collusively made plaintiff in the suit in the Federal court simply for the purpose of creating a case cognizable by that court.

Decree affirmed.